

# Debates on the Federal Judiciary: A Documentary History

*Volume III: 1939–2005*

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# Contents

**Acknowledgments, xiii**

**Introduction, 1**

**New Judicial Positions and the Distribution of Authority, 7**

U.S. Magistrates, 9

Judge Theodore Levin, Reducing Reliance on Commissioners, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, December 15, 1965, 13

Judge Talbot Smith, Support for Enhanced Commissioner Powers, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, July 13, 1966, 15

George Cochran Doub, Expanding Criminal Jurisdiction of Commissioners, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, February 8, 1966, 17

Representative William Cahill, Opposition to Delegation of Judicial Power to Magistrates, House of Representatives, Speech of September 18, 1968, 19

Charles R. Halpern, Fear of Coercion of Parties to Submit Cases to Magistrates, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, June 8, 1977, 22

Dennis Sweeney, Opposition to Designating Magistrates to Decide Civil Cases, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, June 10, 1977, 24

Burt Neuborne, Uniqueness of Article III Adjudication, Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, July 20, 1977, 26

Judge Charles M. Metzner, Approval of Expansion of Magistrate Duties, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, March 30, 1979, 29

U.S. Bankruptcy Judges, 30

Brookings Institution, Proposal for an Independent Bankruptcy Administrative Agency, Report of September 1971, 34

Judge Conrad K. Cyr, Opposition to Separation of Judicial and Administrative Aspects of Bankruptcy, *Commercial Law Journal*, February 1973, 35

Commission on the Bankruptcy Laws of the United States, Need for a Bankruptcy Administrative Agency, Report of July 31, 1973, 37

- Judge Conrad K. Cyr, Disregard for Dollar Value in Determining When Judicial Resolution Is Necessary, *American Bankruptcy Law Journal*, Spring 1975, 40
- Harold Marsh, Conflict of Interest Caused by Bankruptcy Judge Appointment of Trustee, Testimony Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, November 28, 1977, 41
- Judge Homer Drake, Opposition to Presidential Appointment of Bankruptcy Judges, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, February 20, 1975, 43
- Judge John T. Copenhaver, Support for Expanded Bankruptcy Jurisdiction, Testimony Before House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, July 10, 1975, 45
- Ad Hoc Committee on Bankruptcy Legislation of the Judicial Conference of the United States, Opposition to Expanded Bankruptcy Jurisdiction, Testimony Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, November 28, 1977, 47
- Attorney General Griffin B. Bell, Opposition to Creation of Article III Bankruptcy Courts, Testimony Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, November 29, 1977, 48
- National Bankruptcy Review Commission, Advocacy for Creation of Article III Bankruptcy Courts, Report of October 20, 1997, 50
- Susan Block-Lieb, Advocacy for Article III Status and Expanded Jurisdiction for Bankruptcy Judges, *American Bankruptcy Law Journal*, Fall 1998, 52
- Thomas E. Plank, Lack of Necessity for Article III Bankruptcy Judges, *American Bankruptcy Law Journal*, Fall 1998, 54

## **Changes to the Appellate System, 57**

- Civil Rights and the Division of the Fifth Circuit, 60
- Special Committee on the Geographic Organization of the Courts, Recommendation for Dividing Fifth Circuit, March 16, 1964, 63
- Charles Alan Wright, Opposition to “Rule of Nine,” *Texas Law Review*, October 1964, 64
- Judge John C. Godbold, Necessity of Dividing Fifth Circuit, Testimony Before Hruska Commission, August 22, 1973, 67
- Judge John Minor Wisdom, Large Circuits Necessary for Courts of Appeals to Remain Diverse, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, September 24, 1974, 69

- Judge Thomas G. Gee, Lack of Necessity for Splitting Circuits, Testimony Before House Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, September 21, 1977, 71
- Attorney General Griffin B. Bell, Support for Permitting Mississippi to Remain with Eastern States, Testimony Before House Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, September 27, 1977, 73
- U. W. Clemon, Importance for Civil Rights of Leaving Fifth Circuit Intact, Testimony Before House Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, Oct 19, 1977, 74
- Althea T. L. Simmons, Prematurity of Fifth Circuit Split, Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, August 22, 1980, 76
- Judge Robert A. Ainsworth, Jr., Appellate Courts Should Be Trusted to Uphold Civil Rights, Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, August 22, 1980, 79
- National Court of Appeals, 79
- Earl Warren, Opposition to Divesting Supreme Court Justices of Responsibility for Certiorari Review, Bar Association of City of New York, Speech of May 1, 1973, 82
- Chief Justice Warren Burger, Heavy Burden on Justices of Reviewing Petitions for Certiorari, *American Bar Association Journal*, July 1973, 84
- Alexander M. Bickel, Necessity for Screening Petitions for Certiorari Outside of the Supreme Court, Pamphlet of November 1973, 86
- Judge Shirley M. Hufstедler, Importance of Harmonizing National Law, *American Bar Association Journal*, May 1974, 88
- Robert J. Kutak, Support for Transfer Jurisdiction, Testimony Before Hruska Commission, April 15, 1975, 90
- Judge Donald P. Lay, Value of Decentralized Decision Making, Testimony Before Hruska Commission, April 16, 1975, 92
- Terrance Sandalow, Concern Regarding Overreliance on Constitutional Interpretation, Testimony Before Hruska Commission, April 15, 1975, 94
- American Bar Association Special Committee on Coordination of Judicial Improvements, Support for Reference Jurisdiction, Report of February 1976, 96
- U.S. Court of Appeals for the Federal Circuit, 97
- Irving Kayton, Concern About Forum Shopping by Patent Bar, Testimony Before Hruska Commission, May 20, 1974, 99
- Judge John Paul Stevens, Opposition to Specialized Appellate Courts, Testimony Before Hruska Commission, June 10, 1974, 100
- Hruska Commission, Opposition to Creation of Specialized Courts, Report of June 20, 1975, 102

- Charles R. Haworth and Daniel J. Meador, Proposal for Federal Circuit, *University of Michigan Journal of Law Reform*, Winter 1979, 103
- Erwin N. Griswold, Support for Creation of U.S. Court of Tax Appeals, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, May 7, 1979, 105
- Albert E. Jenner, Opposition to Centralization of Patent Appeals, Testimony Before Senate Subcommittee on Courts of the Committee on the Judiciary, May 18, 1981, 108
- Donald R. Dunner, Support for Centralization of Patent Appeals, Testimony Before Senate Subcommittee on Courts of the Committee on the Judiciary, May 18, 1981, 109
- Senate Judiciary Committee, Diverse Docket of New Court, Report of November 18, 1981, 111

### **Criminal Justice Reform, 113**

- Counsel for Indigent Defendants in the Federal Courts, 115
- Committee to Consider the Adequacy of Existing Provisions for the Protection of the Rights of Indigent Litigants in the Federal Courts, Endorsement of Compensation for Appointed Counsel, Report of September 26, 1944, 117
- Representative Emanuel Celler, Support for Federal Public Defenders, Testimony Before House Subcommittee No. 2 of the Committee on the Judiciary, May 14, 1959, 119
- Judge E. J. Dimock, Opposition to Federal Public Defenders, Testimony Before House Subcommittee No. 2 of the Committee on the Judiciary, May 6, 1959, 121
- Allen Committee, Governmental Obligation to Provide Defense Counsel, Report of February 25, 1963, 124
- Senator Sam J. Ervin, Jr., Necessity of Improved Representation for Indigent Defendants, *American Bar Association Journal*, May 1963, 126
- Representative Byron G. Rogers, Opposition to Public Defender System, House of Representatives, Speech of January 15, 1964, 128
- Judge A. Sherman Christensen, Value of Uncompensated Representation, *American Bar Association Journal*, August 1965, 130
- Terence F. MacCarthy, Support for District Choice of Defender System, Testimony Before Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, June 24, 1969, 132
- Detention Before Trial and Conviction, 135
- Bail Reform Act of 1966, 137
- Senator Roman L. Hruska, Unfairness of Bail System, Testimony Before Senate Subcommittees on Constitutional Rights and on Improvements in Judicial Machinery of the Committee on the Judiciary, August 4, 1964, 139

- Charles H. Bowman, Support for Elimination of Bail Bonds, Testimony Before Senate Subcommittees on Constitutional Rights and on Improvements in Judicial Machinery of the Committee on the Judiciary, August 6, 1964, 140
- George L. Will, Necessity of Bail Bond System, Testimony Before Senate Subcommittees on Constitutional Rights and on Improvements in Judicial Machinery of the Committee on the Judiciary, August 4, 1964, 141
- Jack T. Conway, Excessive Burden of Bail System on the Poor, Testimony Before Senate Subcommittees on Constitutional Rights and on Improvements in Judicial Machinery of the Committee on the Judiciary, June 16, 1965, 144
- Preventive Detention, 146
- Senator Robert C. Byrd, Support for Preventive Detention, Testimony Before Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, February 4, 1969, 147
- Abraham S. Goldstein, Opposition to Preventive Detention, *The New Republic*, March 8, 1969, 150
- Attorney General John N. Mitchell, Constitutionality of Preventive Detention, *Virginia Law Review*, November 1969, 151
- Patricia M. Wald, Alternatives to Preventive Detention, Testimony Before Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, January 22, 1969, 153
- Laurence H. Tribe, Unfairness and Ineffectiveness of Preventive Detention, *Virginia Law Review*, April 1970, 156
- Judge Charles W. Halleck, Effectiveness of Preventive Detention, Testimony Before Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, January 22, 1969, 157
- Speedy Trial Act of 1974, 160
- Representative Abner J. Mikva, Introduction of Pretrial Crime Reduction Act, House of Representatives, Speech of November 17, 1969, 161
- Attorney General John N. Mitchell, Opposition to Speedy Trial Legislation, Address to American Bar Association, July 16, 1971, 163
- Assistant Attorney General William H. Rehnquist, Criticism of Dismissal Sanction, Testimony Before Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, September 14, 1971, 165
- Senator Sam J. Ervin, Jr., Importance of Congressional Speedy Trial Mandate, Opening Statement to Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, April 17, 1973, 167
- Daniel J. Freed, Support for Speedy Trial Act of 1974, Testimony Before House Subcommittee on Crime of the Committee on the Judiciary, September 18, 1974, 169

Bail Reform Act of 1984, 172

Senate Judiciary Committee, Favorable Report on Preventive Detention Bill, August 4, 1983, 172

Habeas Corpus Reform, 175

Paul M. Bator, Importance of Finality in Criminal Proceedings, *Harvard Law Review*, January 1963, 178

Judge Henry J. Friendly, Dangers of Elevating Procedural Issues to Constitutional Claims, Ernst Freund Lecture at University of Chicago Law School, 1970, 180

Attorney General Richard G. Kleindienst, Support for Limiting Habeas Corpus, Letter to Emanuel Celler, June 21, 1972, 183

Melvin L. Wulf, Importance of Habeas Corpus to Vindication of Constitutional Rights, *Brooklyn Law Review*, Fall 1973, 184

Alabama Chief Justice C. C. Torbert, Jr., Integrity of State Criminal Justice Systems, Testimony Before Senate Subcommittee on Courts of the Committee on the Judiciary, November 13, 1981, 187

Larry W. Yackle, Necessity of Federal Oversight of State Criminal Justice, *Iowa Law Review*, May 1983, 190

U.S. Department of Justice, Office of Legal Policy, Advocacy of Abolition of Federal Habeas Corpus Review of State Convictions, Report of May 27, 1988, 193

Sentencing Reform, 195

Judge Marvin E. Frankel, Advocacy for Sentencing Commission, *Criminal Sentences: Law Without Order*, 1973, 197

Senator Edward M. Kennedy, Proposal for Sentencing Reform, *Judicature*, December 1976, 200

Pierce O'Donnell, Michael J. Churgin, Dennis E. Curtis, Support for Establishment of a Sentencing Commission, *Toward a Just and Effective Sentencing System*, June 1977, 202

Judge David L. Bazelon, Value of Judicial Discretion in Sentencing, Speech to Conference on Crime and What We Can Do About It, April 2, 1977, 204

Senator Charles McC. Mathias, Jr., Opposition to Sentencing Reform Bill, U.S. Senate, Speech of January 27, 1984, 206

Senator Charles McC. Mathias, Jr., Proposed Amendments to Sentencing Reform Bill, U.S. Senate, Speech of January 31, 1984, 209

Senator Edward M. Kennedy, Opposition to Proposed Amendments to Sentencing Reform Bill, U.S. Senate, Speech of January 31, 1984, 211

**Civil Justice Reform and Access to the Courts, 213**

Diversity Jurisdiction, 216

American Law Institute, Support for Curtailing Diversity Jurisdiction, Draft Report of September 25, 1965, 218



- Donald T. Weckstein, Opposition to Curtailment of Diversity Jurisdiction, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, October 5, 1971, 221
- U.S. Department of Justice, Committee on Revision of the Federal Judicial System, Recommendation for Abolition of Diversity Jurisdiction, Report of January 1977, 223
- Judge Henry J. Friendly, Prioritization of Federal Question Jurisdiction Over Diversity Jurisdiction, Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, September 29, 1977, 225
- Legal Services Attorneys, Elimination of Barriers to Enforcement of Federal Rights, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, March 20, 1978, 227
- Robert G. Begam, Importance of Forum Choice, Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, September 21, 1977, 229
- Edward W. Mullinix and John C. Shepherd, Support for Retention of Diversity Jurisdiction, *American Bar Association Journal*, June 1979, 231
- Federal Courts Study Committee, Recommendation for Elimination of Diversity Jurisdiction, Report of April 2, 1990, 233
- The Anti-Trial Movement, 236
- Case Management and Settlement, 237
- Judge William W. Schwarzer, Advocacy for Judicial Pretrial Management, *Judicature*, April 1978, 238
- Judith Resnik, Criticism of Managerial Judging, *Harvard Law Review*, December 1982, 241
- Judge Robert F. Peckham, Criticism of Laissez-Faire Judging, *Rutgers Law Review*, Winter 1985, 243
- Owen M. Fiss, Centrality to Court's Purpose of Making Judgments, *Yale Law Journal*, May 1984, 245
- Judge Jack B. Weinstein, Dangers of Restricting Access to the Courts, *University of Pennsylvania Law Review*, June 1989, 247
- Alternative Dispute Resolution, 251
- Judge Edwin A. Robson, Benefits of Arbitration, Address to Chicago Advisory Council of American Arbitration Association, December 6, 1974, 252
- Committee on Federal Courts of the Association of the Bar of the City of New York, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, April 14, 1978, 254

U.S. Department of Justice, Ad Hoc Panel on Dispute Resolution and Public Policy, Support for Alternative Dispute Resolution, Report of January 1984, 256

Federal Courts Study Committee, Subcommittee on the Role of the Federal Courts and Their Relationship to the States, Additional Costs Imposed by Alternative Dispute Resolution, Report of July 1, 1990, 258

Judge G. Thomas Eisele, Opposition to Mandatory Arbitration, Letter to Judicial Conference of the United States, March 8, 1993, 260

Class-Action Reform, 262

Abraham L. Pomerantz, Usefulness of Class-Action Remedy, *The Business Lawyer*, April 1970, 264

Milton Handler, Managerial Burden of Class Actions, Address to Association of the Bar of the City of New York, October 13, 1970, 265

William Simon, Misuse of Class Actions by Attorneys, Speech to Ninth Circuit Judicial Conference, Pasadena, California, July 27, 1972, 268

Francis R. Kirkham, Quasi-Legislative Function of Class Actions, Addendum to 1976 Speech to Pound Conference, 1979, 270

Vice President Walter F. Mondale, Necessity of Class Actions for Protection of Ordinary Citizens, Speech to Second Judicial Circuit Conference, Buck Hill Falls, Pennsylvania, September 10, 1977, 271

Assistant Attorney General Daniel J. Meador, Support for Public Actions Brought by Department of Justice, Testimony Before Senate Subcommittee on Judicial Machinery of the Committee on the Judiciary, November 29, 1978, 273

Bruce Meyerson, Opposition to Public Action, Testimony Before Senate Subcommittee on Judicial Machinery of the Committee on the Judiciary, November 29, 1978, 276

J. Fred Byset and M. Kendall Fleeharty, Excessively Punitive Nature of Public Action, Testimony Before Senate Subcommittee on Judicial Machinery of the Committee on the Judiciary, November 29, 1978, 278

Arthur R. Miller, Opposition to Changes to Class-Action Rules, *Harvard Law Review*, January 1979, 280

Representative Bob Goodlatte, Need for Expansion of Federal Jurisdiction Over Class Actions, Testimony Before House Committee on the Judiciary, May 15, 2003, 283

Brian Wolfman, Opposition to Effectively Eliminating State Court Jurisdiction Over Class Actions, Testimony Before House Committee on the Judiciary, May 15, 2003, 285

Judicial Panel on Multidistrict Litigation, 287

Henry W. Sawyer III, Opposition to Judicial Panel on Multidistrict Litigation, Speech to Third Circuit Judicial Conference, September 10, 1965, 289

- Judge Alfred P. Murrah, Need for Centralized Control over Multiple Litigation, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary, October 21, 1966, 290
- Judge Edwin A. Robson, Support for Judicial Panel on Multidistrict Litigation, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, October 20, 1966, 292
- Philip Price, Burden on Litigants of Transfer of Multidistrict Cases, Letter to Senator Hugh Scott, October 20, 1966, 294
- American Bar Association Section on Antitrust Law, Disapproval of Judicial Panel on Multidistrict Litigation, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, January 24, 1967, 296

### **Judicial Discipline and Removal, 299**

- Senator Joseph D. Tydings, Need for an Alternative to Impeachment, Opening Statement to Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, February 15, 1966, 302
- Senator Joseph D. Tydings and Judge John Biggs, Jr., Need for a National Commission on Judicial Disability and Tenure, Exchange Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, April 23, 1968, 304
- Judge Clement F. Haynsworth, Jr., Support for a National Commission for the Removal of Unfit Judges, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, June 2, 1969, 308
- Judge Stephen S. Chandler, Exclusive Authority of Congress to Supervise Judges, Reply Brief in *Chandler v. Judicial Council of the Tenth Circuit*, Supreme Court of the United States, October Term 1969, 309
- Justice William O. Douglas, Independence of Judges from Each Other, Dissenting Opinion in *Chandler v. Judicial Council of the Tenth Circuit*, Supreme Court of the United States, June 1, 1970, 312
- Judge Frank J. Battisti, Opposition to Vesting Judiciary with Power to Remove Judges, Address at Boston College Law School, November 18, 1971, 313
- Senator Sam Nunn, Public Confidence in the Judiciary, U.S. Senate, Speech of April 29, 1977, 316
- Judge J. Clifford Wallace, Opposition to the Nunn Bill, *Judicature*, May 1978, 318
- Judge J. Edward Lumbard, Support for the Nunn Bill, *Judicature*, May 1978, 320

Judge Irving R. Kaufman, Threat to Judicial Independence of a Commission on Judicial Conduct, Benjamin Cardozo Lecture to the Association of the Bar of the City of New York, November 1, 1978, 322

Raoul Berger, Appropriateness of Judicial Removal Power Within Judicial Branch, *Cornell Law Review*, June 1979, 323

National Commission on Judicial Discipline and Removal, Effectiveness of Judicial Conduct and Discipline Act of 1980, Report of August 2, 1993, 326

**For Further Reference, 329**

**Index, 331**

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# Introduction

This is the concluding volume of a three-volume series presenting historical documents from debates over legislative proposals concerning the federal judiciary. Volume I began with the Constitutional Convention of 1787, where the founders laid out a general plan for the federal judiciary in Article III of the U.S. Constitution, and concluded with the Jurisdiction and Removal Act of 1875, by which Congress endowed the federal courts with jurisdiction over cases arising under the Constitution, treaties, and laws of the United States. Some of the issues covered in the opening volume included the Judiciary Act of 1789, circuit riding, impeachment, judicial tenure, and judicial review. Volume II covered such topics as the establishment of the U.S. courts of appeals, the abolition of the U.S. circuit courts, proposals to alter judicial tenure, and a campaign to limit federal jurisdiction, before concluding in 1939 with the establishment of an independent administrative apparatus made up of circuit judicial councils and the Administrative Office of the U.S. Courts.

If one looks at broad structural matters concerning the federal judiciary, it appears that most major issues were settled by 1939. Modern-day federal judicial administration, as mentioned above, dates to that year. The Federal Rules of Civil Procedure, which ended a century and a half of inconsistent procedure in the federal courts, took effect the year before. The three-tiered court system of today—consisting of the U.S. district courts, the U.S. courts of appeals, and the Supreme Court of the United States—was in place by 1912, following the abolition of the U.S. circuit courts (which had been the primary federal trial courts since 1789) and the transfer of their jurisdiction to the U.S. district courts. The broad outlines of federal court jurisdiction have not experienced seismic change since the establishment of general federal question jurisdiction in 1875 and the Supreme Court's broad discretion over its docket granted to it under the Judiciary Act of 1925 (also known as the Judges' Bill).

While it is true that the basic structure of the federal judiciary has been in place for a century, a singular focus on large structural factors obscures a reality that is far more interesting and complex. An examination of policymaking for the courts on a more granular level reveals

the persistence of vigorous debate over the fundamental purpose, role, and operation of the courts in a wide variety of policy contexts.

During the decades comprising the heart of this volume, the federal government's role in American life expanded, which had significant consequences for the federal courts. Rapid economic growth from the end of World War II until the early 1970s, combined with technological progress, triggered a sharp rise in the number of federal lawsuits. Many of these cases were complex, involving intricate technical issues, multiple parties, and occasionally, related cases being filed in multiple judicial districts. At the same time, a rise in consumption combined with increasing use of consumer credit caused a major increase in bankruptcy filings, further burdening the courts. Spiraling crime rates in the 1960s and beyond further strained the resources of the courts at both the trial and appellate levels.<sup>1</sup>

The pressure on the federal judiciary was linked with the nearly universal perception that caseload growth was the problem most in need of legislative solutions. Adding large numbers of new judges was problematic, not only because of the cost involved but because of the widespread and deeply held belief that the Article III judiciary should remain small and elite. As a result, many of the debates about judicial reform in this period arose from proposals to ease the courts' workload by other means. Examples included the creation of the U.S. magistrate and U.S. bankruptcy judge positions to assume some of the duties being performed by U.S. district court judges; the effort to abolish diversity jurisdiction, which would leave cases involving only state law entirely to the state courts; the establishment of the Judicial Panel on Multidistrict Litigation for the more efficient handling of complex cases filed in multiple courts; class-action reform to promote the more efficient handling of large cases on the courts' dockets; habeas corpus reform, in part to reduce the number of petitions the federal courts received from state prisoners claiming their detention violated a federal right; and the proposed creation of a national court of appeals, in part to lighten the Supreme Court's burdens of reviewing petitions for certiorari and to resolve circuit splits in the interpretation of federal law.

1. For a general discussion of rising caseloads in the federal courts, see Richard A. Posner, *The Federal Courts: Challenge and Reform* (Cambridge: Harvard University Press, 1996).



Rising caseloads were critical to legislative debates over reforms to the criminal justice system, but policy discussions were also influenced by a greater societal awareness of poverty and a stronger focus on individual rights. An important example was the debate over pre-trial detention, spurred by concerns about a bail system that made a defendant's financial means the primary determinant of whether they would remain incarcerated while awaiting trial.

While the courts' ability to handle an increased workload, particularly from the 1960s onward, was at the root of most of the legislative proposals covered in this volume, it is not the main subject matter of the volume. The debates compiled here involve broader and weightier issues than the capacity of the courts. Some of these issues, such as the separation of powers, federalism, and judicial independence, raise concerns that have been debated in various contexts since the founding. Other issues, including the protection of individual federal rights, access to justice, and the extent to which certain parties and controversies could or should be diverted away from adjudication in an Article III forum, are of a more recent vintage.

Each of the debates covered in this volume serve to illustrate that when it comes to the federal judiciary, there is no such thing as a purely technical or procedural reform. On the contrary, every policy change that was under consideration had potentially significant consequences for the substance of the work the courts perform as well as the nature of the justice those courts provide to the American people. And no policy proposal was value-neutral; each one involved prioritizing between competing goals and ideals.

The three-volume series concluded here demonstrates that the judicial branch, while independent, has never been free from politics. The founders—by sketching only the barest outlines of the federal judiciary in Article III, while leaving it to Congress to establish courts and fill in most of the details—ensured that all debates about the federal courts would be political in nature. Questions surrounding court structure, jurisdiction, judicial tenure, judicial administration, and court procedure, among others, have always been the subject of sharp disagreement and spirited debate.

That being said, the debates presented in this volume did not always, or even usually, break down across easily identifiable constituencies. Issues related to criminal justice reform were perhaps the most ideologically polarized, with liberals generally advocating for greater

protection of defendants' rights and most conservatives looking for solutions to reduce crime rates. This dynamic played out most clearly in the contexts of sentencing reform, pretrial detention, and habeas corpus. Other issues with especially coherent constituencies included the proposed split of the Fifth Circuit, which many feared would weaken protection for African American civil rights in the South, and class-action reform, which pitted the plaintiffs' bar and advocates for consumer protection against the large corporations most likely to be class-action defendants.

In many other debates, however, policy preferences did not correlate strongly with party affiliation, ideological bent or job title. Judges were often split amongst themselves on policy issues, as were attorneys, law professors, and members of Congress. The complexity of the issues under consideration combined with the variety of arguments espoused makes studying these debates through primary source documents particularly valuable.

While Volume III spans the period from 1939 through 2005, the overwhelming majority of the documents presented here—primarily from congressional floor debates and committee hearings, law review articles, and reports of commissions charged with the study of issues concerning the courts—date from the 1960s, 1970s, and 1980s. Those were the decades during which the most significant legislative proposals concerning the judiciary originated and during which the bulk of the debates over those proposals took place. The volume is organized thematically into five sections. The first section addresses the creation of two new types of judicial positions: U.S. magistrates and U.S. bankruptcy judges, both of which were imbued with greater powers than their predecessor offices, those of U.S. commissioner and referee in bankruptcy, respectively. The second section focuses on proposed reforms to the federal appellate system, including proposals to divide the Fifth Circuit, to create a national court of appeals, and to create the U.S. Court of Appeals for the Federal Circuit. In the third section, debates over criminal justice reforms, many of them focused on defendants' rights, are explored. Separate sections address access to counsel for indigent defendants, pretrial detention (including bail reform, speedy trial, and preventive detention legislation), the creation of the U.S. Sentencing Commission, and changes to the law of habeas corpus. Civil justice reforms, including the proposed abolition of diversity jurisdiction, efforts to limit the use of class actions, the creation

of the Judicial Panel on Multidistrict Litigation, and attempts to ease the pressure of mounting caseloads through settlement and alternative dispute resolution, are the subjects of the fourth section. Lastly, the fifth section addresses the issue of judicial conduct and disability, particularly in the context of efforts to empower the judicial branch to remove judges deemed unfit without resorting to the impeachment process.



# New Judicial Positions and the Distribution of Authority

In the 1960s and 1970s, many members of Congress, the federal judiciary, and the legal profession felt that the growth in caseloads that had been accelerating since the end of World War II had reached a crisis point. The perception that congestion and delay were the most urgent issues confronting the federal courts seemed to be nearly universal among judges, lawyers, and legislators. As a result, from the 1960s onward, many policy proposals regarding the judiciary—such as the creation of the Federal Judicial Center (FJC) in 1967, the establishment of the circuit executive position in 1971, and the cost and delay reduction strategies resulting from the Civil Justice Reform Act of 1990—were aimed at helping the courts process their cases more quickly and efficiently.

Two significant policy proposals involved the creation of new judicial positions—U.S. magistrates<sup>2</sup> and U.S. bankruptcy judges—each of which was designed to absorb some of the functions then being carried out by the judges of the U.S. district courts. These proposals, born mainly of anxiety about the efficiency of the courts, caused policymakers to debate the distribution of judicial authority and the concept of judicial prestige. Specifically, policymakers debated the method of appointment and constitutional status of these officers as well as the nature of the tasks they would be authorized to perform. Central to these debates was the question of which tasks were essential attributes of the federal judicial power—a power to be exercised only by judges possessing the tenure and salary protections of Article III of the U.S. Constitution—and which fell outside of this scope and could be delegated to other judges.

The Federal Magistrates Act of 1968<sup>3</sup> authorized the new judicial officers, appointed by district judges, to conduct some misdemeanor trials with the consent of the defendant, to serve as special masters in civil actions, and to assist district judges with pretrial and discovery

2. The original title of *U.S. magistrate* was later changed to *U.S. magistrate judge*. Judicial Improvements Act of 1990, 104 Stat. 5089 (1990).

3. Federal Magistrates Act of 1968, 82 Stat. 1107 (1968).

matters and motions for posttrial relief. Congress granted magistrates the power to conduct habeas corpus proceedings in 1976 and passed a more extensive law in 1979 allowing magistrates to conduct all misdemeanor trials with the consent of the defendant and to conduct all civil trials with the consent of the parties. Opponents of expanded magistrate powers feared that criminal defendants and civil litigants of lesser means would be coerced to accept an inferior brand of justice dispensed by non-Article III officials, who lacked the judicial independence of the U.S. district judges, while proponents saw the issue in terms of not only enhancing efficiency but also increasing access to federal courts.<sup>4</sup>

In 1978, following a steady rise in the number of bankruptcy cases filed in federal court, Congress reorganized the bankruptcy system for the first time since 1898.<sup>5</sup> A proposal to establish an administrative agency in the executive branch to handle certain aspects of the bankruptcy process failed. However, Congress established the position of U.S. bankruptcy judge to replace the referees in bankruptcy who had presided over such proceedings for the previous eighty years. Congressional debates over the new judges centered on whether or not they would be cloaked with the tenure and salary protections of Article III and what the extent of their jurisdiction would be. At first, the bankruptcy judges were appointed to fourteen-year terms by the president, with the advice and consent of the Senate, and had wide-ranging powers, including jurisdiction over matters “arising in or related to” bankruptcy cases, which had previously been handled by district judges.<sup>6</sup>

4. For further reading on the history of federal magistrates, see Christopher E. Smith, *United States Magistrates in the Federal Courts: Subordinate Judges* (New York: Praeger, 1990); Joseph F. Spaniol, Jr., “The Federal Magistrates Act: History and Development,” *Arizona State Law Journal* 47, no. 4 (1974): 565–578; and Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton: Princeton University Press, 2012).

5. Bankruptcy Reform Act of 1978, 92 Stat. 2657 (1978).

6. For further background on the history of bankruptcy reform, see David A. Skeel, Jr., *Debt’s Dominion: A History of Bankruptcy Law in America* (Princeton: Princeton University Press, 2001); Charles Jordan Tabb, “The History of the Bankruptcy Laws in the United States,” *American Bankruptcy Institute Law Review* 3, no. 1 (Spring 1995): 5–52; George M. Treister et al., *Fundamentals of Bankruptcy Law* (Philadelphia: American Law Institute, 1996); and Crowe, *supra* note 2.

In 1982, the Supreme Court of the United States ruled that Congress had unconstitutionally delegated to bankruptcy judges essential elements of the judicial power reserved exclusively for judges possessing Article III status.<sup>7</sup> In response, Congress amended the Bankruptcy Act in 1984 and limited bankruptcy judges to submitting proposed findings of fact and conclusions of law to the district court in any matter not deemed a “core” bankruptcy proceeding. The 1984 amendments also shifted the appointment power from the president to the U.S. courts of appeals.<sup>8</sup>

Most policymakers and other interested parties agreed that the federal courts needed magistrates and bankruptcy judges to meet the challenge of ever-increasing caseloads, although some favored the appointment of additional U.S. district judges instead. The main points of disagreement were how these new judicial officers would be appointed, whether or not they would be cloaked with the tenure and salary protections of Article III, and which judicial tasks they would be authorized to perform. The resolution of these questions helped to define the extent of the federal judicial power the Constitution had established as well as the limits on the permissible distribution of judicial authority.

## *U.S. Magistrates*

Proposals in the 1960s to create the U.S. magistrate position and the substantial expansion of magistrates’ jurisdiction in the 1970s spurred debates about the essential attributes of the federal judicial power. Policymakers disagreed about the wisdom of establishing a set of judicial officers lacking the tenure and salary protections of Article III of the U.S. Constitution and also disagreed about which judicial duties would be appropriate to assign to such officers.

The magistrate position evolved from the office of United States commissioner, which had existed in some form since 1793, when Congress authorized judges of the U.S. circuit courts to appoint “discreet persons learned in the law” to take bail in federal criminal proceedings. Congress expanded the authority of these officers through-

7. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

8. Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 333 (1984).

out the nineteenth century, granting them powers to enforce specific federal laws such as the Fugitive Slave Act of 1850, the Civil Rights Act of 1866, and the Chinese Exclusion Acts of the 1880s. Circuit courts were authorized to appoint as many commissioners as necessary, and in 1878 the Department of Justice estimated that nearly 2,000 commissioners served the federal courts.

Most commissioners were lawyers who carried out their judicial responsibilities while pursuing their own practices, though after 1812, commissioners did not have to be trained lawyers. Federal court officers such as clerks sometimes served as commissioners, as did officers of state and local courts. In 1896, Congress formally established the office of U.S. commissioner with a four-year term and a uniform fee schedule for compensation. The 1896 reforms placed the appointment of commissioners in the hands of district courts and prohibited other court officers from acting as commissioners.

The role of commissioners continued to grow in the twentieth century. In 1940, Congress passed a law permitting district court judges to authorize commissioners to try petty offenses committed on federal “enclaves.” Defendants had the right to request a trial in the district court and could appeal a commissioner’s decision. Commissioners also held preliminary hearings to inform a defendant of charges and to determine if an arrest was justified by probable cause. Furthermore, commissioners appointed attorneys for indigent defendants, particularly after the Criminal Justice Act of 1964 expanded the right to counsel.

In 1965, the Subcommittee on Improvements in Judicial Machinery of the U.S. Senate Committee on the Judiciary, led by its chairman Senator Joseph Tydings launched a wide-ranging examination of federal judicial operations, which included hearings to investigate the shortcomings of the U.S. commissioner system. One concern was that at least 30 percent of commissioners lacked legal training and that many commissioners were part-time officers paid by a fee system that did not provide compensation commensurate with their important responsibilities. While a few lawyers and judges argued that commissioners’ tasks should be downgraded, the majority of those advocating changes believed that replacing commissioners with magistrates possessing greater powers was the best way to ease court congestion.

The reform effort culminated in the Federal Magistrates Act of 1968, which abolished the commissioner system and created the of-



fice of U.S. magistrate, a non-Article III position to be filled by attorneys appointed by the U.S. district judges. The law authorized the magistrates to conduct certain misdemeanor trials with the consent of the defendants, to serve as special masters in civil actions, and to assist district judges in pretrial and discovery proceedings and appeals for posttrial relief. The Act also authorized a majority of district judges on any court to assign to magistrates “additional duties as are not inconsistent with the Constitution and laws of the United States.” The Judicial Conference of the United States was to set the number of magistrate judgeships, subject to congressional funding of the positions.

Following a pilot program in five judicial districts, the Judicial Conference approved the creation of 83 full-time magistrate positions and 450 part-time magistrate positions in 1971.<sup>9</sup> By 1977, the Judicial Conference had increased the number of full-time magistrates to 164 and lowered the number of part-time magistrates to 305.<sup>10</sup> The magistrate system allowed the district courts, which had not been granted any new Article III judgeships since 1971, to increase the case disposition rate from 315 per judge in 1971 to 386 per judge in 1976.<sup>11</sup>

Between 1975 and 1979, Congress considered proposals to give magistrates greater responsibility over civil cases and in the process sparked debate about the extent to which the duties of district court judges could be distributed to non-Article III judicial officers. The 1968 enabling statute had left discretion over the duties assigned to magistrates largely in the hands of district courts. In response to a 1974 Supreme Court decision prohibiting magistrates from holding evidentiary hearings on habeas corpus petitions,<sup>12</sup> the Judicial Conference of the United States urged Congress to provide magistrates with such authority and to expand and clarify their authority to conduct pretrial proceedings in criminal cases. The resulting statute, passed in 1976, was important for ensuring that the district courts could

9. *Annual Report of the Director of the Administrative Office of the United States Courts*, 1972, 247.

10. *Reports of the Proceedings of the Judicial Conference of the United States*, September 15–16, 1977, 64.

11. U.S. Senate, Committee on the Judiciary, *The Magistrate Act of 1977*, S. Rep. 95-344, 95th Cong., 1st sess., July 14, 1977, 3.

12. *Wingo v. Wedding*, 418 U.S. 461 (1974).

meet the demands of processing criminal cases in compliance with the Speedy Trial Act of 1974.<sup>13</sup>

While the 1976 law was focused on pretrial procedures, in 1977 Congress began to consider proposals to provide magistrates with more jurisdiction over criminal matters as well as the authority to conduct civil trials. The Judicial Conference and the Department of Justice (DOJ) drafted competing bills that differed in their particulars but expanded magistrates' powers in both criminal and civil matters. The DOJ bill, which was more expansive, was closer to what Congress ultimately produced in the Federal Magistrates Act of 1979.<sup>14</sup> That law gave magistrates the power to try all criminal misdemeanor cases; previously, magistrates had jurisdiction only over cases with a maximum penalty of one year's imprisonment and/or a fine of \$1,000. The statute also provided that magistrates could try any civil case, with or without a jury, upon being designated to do so by the district court and with the consent of all parties. Parties to a civil case tried before a magistrate could appeal a judgment to the district court or directly to a U.S. court of appeals.

The debate over magistrate duties raised the issue of access to federal courts by poor and middle-class litigants. Supporters of expanded magistrate responsibilities argued that smaller cases should not be channeled through the same procedures as were large and complex cases. Magistrates promised to bring expediency and savings to litigants who normally could not afford the cost and delay of litigating in a federal district court. Moreover, increased magistrate authority would limit the number of additional district judgeships needed, thereby permitting the maintenance of a small and elite Article III judiciary. Opponents of a larger role for magistrates worried, however, that poorer litigants would be steered towards an inferior, non-Article III brand of justice once they entered federal court. The debate also led to fundamental questions about which parts of a district judge's responsibilities were essential to the judicial function under Article III and which judicial duties could properly be entrusted to others.

13. An act to improve judicial machinery by further defining the jurisdiction of United States magistrates, and for other purposes, 90 Stat. 2729 (1976). The Court later upheld against a due process challenge the statutory scheme by which magistrates conducted criminal pretrial proceedings. *U.S. v. Raddatz*, 447 U.S. 667 (1980).

14. Federal Magistrates Act of 1979, 93 Stat. 643 (1979).

Judge Theodore Levin, Reducing Reliance on Commissioners,  
Testimony Before Senate Subcommittee on Improvements  
in Judicial Machinery of the Committee on the Judiciary,  
December 15, 1965

Judge Theodore Levin was noteworthy as one of the few witnesses to come before the subcommittee chaired by Joseph Tydings to advocate reducing the responsibilities of commissioners rather than elevating their status and duties. His U.S. district court in Michigan had largely abandoned the commissioner system twenty years earlier. In Detroit, where the bulk of business in the district occurred, court clerks and deputy clerks acted as commissioners when necessary (usually fixing bail) without any additional compensation, and district judges performed the remainder of the tasks usually handled by commissioners in other courts. Levin argued before the subcommittee that non-Article III judicial officers would not be capable of providing the same quality of adjudication as would those judges appointed by the president and confirmed by the Senate.

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Judge LEVIN. May I be so presumptuous, Mr. Chairman, as to suggest that I don't believe that there ought to be created a tier of judges in the Federal system on the trial level. I am not unmindful of the problems in districts containing major Federal enclaves—but in general, I don't know why a man who faces a 6-month penalty ought to get a different kind of justice than a man who faces a 2-year penalty. I don't know why a man who is sentenced to 6 months by a judge, with the consequence of dislocation of his family and his business, ought to have that judgment by a judge who obviously doesn't have the experience and the responsibility of a U.S. district judge. . . .

Senator TYDINGS. Judge Levin, . . . if the post of U.S. commissioner were sufficiently upgraded, given the standard of a full-time lawyer, the same background, let's say, as a referee in bankruptcy, the same requirements as U.S. district judge, just on the point of competency, do you think he would be competent to handle the jurisdiction which is presently . . . given to U.S. commissioners, plus a broadened petty offense jurisdiction and a broadened misdemeanor jurisdiction?

Judge LEVIN. Well, I think being a judge requires a lot of judgment and experience, not only in criminal matters but in all matters. . . .

I am opposed to the idea of having a commissioner, whether he is called a commissioner or judge, handle criminal matters alone. . . .

You acquire a judgment, you acquire a concept of the whole idea of justice, and I don't think that a man who is to hear misdemeanor cases no matter how well qualified he may be or a graduate of the best law school, is as qualified as a man who is appointed by the President, confirmed by the Senate of the United States, such a man has the awesome responsibility that goes with the job and who comes to a realization if he has any humility in his soul, that the one who is up for the possible maximum punishment of 6 months deserves the same full consideration as does a man who has committed a more grievous crime and is facing a 10-year penalty, because a mistake in judgment may ruin a man's life, while a sound judgment may help him to a better life.

Senator TYDINGS. Do you feel that two men, two lawyers with the same qualifications, the same background, the same experience, one is appointed by the U.S. district court as a full-time permanent U.S. commissioner, with a salary at \$22,500 a year, and the other appointed by the President and confirmed by the Senate to be a U.S. district court judge at \$30,000 a year, the second is automatically more capable or more able to try a case involving—

Judge LEVIN. Well, the way you put the question, Mr. Chairman, the difference is only \$7,500 a year. You said the same experience, same background, same judgment. . . .

And just as wise a man and as mature a man, the answer is obviously yes, he is just as competent. But I say to you that system cannot possibly be invoked and get the same result because you are not going to get the same qualifications in a man engaged in a narrow area of the law as you will in a person with a wide experience and maturity. Then again, if I may suggest to the chairman and to Senator Hart, and other members of the committee, if you set up a man with all that authority, you have to provide him with staff and a courtroom. What are you saving? Why don't you appoint another judge? We have eight judges [in the Eastern District

of Michigan], give us one more judge if you think we are overburdened. Isn't that the solution?

[U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on the United States Commissioner System*, 89th Cong., 1st sess., Part 2, 166, 172.]

Judge Talbot Smith, Support for Enhanced Commissioner Powers, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, July 13, 1966

Judge Levin's belief that neither commissioners nor magistrates were necessary for the proper administration of a district court did not go unchallenged, even by judges within his own district. Judge Talbot Smith, also of the Eastern District of Michigan, countered Levin's assessment by suggesting that the failure to utilize commissioners harmed the district court in Detroit. He lamented that district judges were forced to take on trivial "police court" duties that could be taken care of by a subordinate court officer.

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The office of Commissioner should either be eliminated entirely or it should be made significant and meaningful in our Federal system. My preference is for the latter choice. Actually, I think, there is no other course of action open to us. We have seen in Detroit the result of the abolition of Commissioners and, speaking for myself and those other Detroit judges who favor their re-employment, we do not approve of the results. In so saying we recognize that others of our court take a contrary view.

We value their judgment and we have worked harmoniously with them on the problem but it is obvious that in this area our professional judgments differ. . . .

During the time I was privileged to serve as a Justice of the Supreme Court of Michigan the only serious criticism of our Federal Court that I heard arose out of precisely the point we are here considering, namely, the non-use of Commissioners. The criticism came from a senior partner of one of Detroit's largest and most respected law firms, a lawyer of extensive trial experience. It was his complaint that ours was the only Federal Court in the coun-

try, to his knowledge, where the judge hearing a trial would interrupt it twice a day, regardless of its importance or complexity, to hear trivial and police court matters, if the trial judge happened that week to be assigned to the “Miscellaneous Docket” . . . . His criticism was so vigorous that it has lingered in my mind.

Moreover, in my judgment, it is indefensible, as a matter of sound judicial administration, to require a District Judge to take his time, whether he is interrupting a trial or not, to do such things as to swear an Internal Revenue agent to the agent’s statement that yesterday he discovered ten jugs of moonshine when he executed a search warrant. Notaries public take more significant oaths every day of the week.

The basic problem facing the entire Federal judiciary today is the problem of making the best use of the Judge’s time. It cannot reasonably be denied by anyone that while a Federal Judge is doing the work of a justice of the peace, or a notary public, that he cannot be doing anything else. And, furthermore, that there are more important uses for his time, whether it be spent in the litigation of significant Federal questions, in the writing of thoughtful and reflective opinions, or in research upon the law as to matters not clearly settled by precedent.

To those who say that the overall time spent by District Judges on Commissioners’ work is not, or would not be, substantial (if Commissioners were eliminated) our reply is that it depends upon what is viewed as substantial. In our opinion any time spent by a District Judge on a trivial function is an unjustifiable allocation of the limited time available to him and is a substantial interference with the performance of his significant judicial functions. . . .

Our District Court time-problem is further compounded by the provisions of recent enactments. Since the employment of attorneys to represent criminal defendants who have not adequate funds for their own defense now involves the expenditure of public funds, and not the donation of time of public-spirited counsel, certain forms not heretofore required must now be completed. The obtaining of the necessary information and its accurate recording on the required forms, must be the responsibility of someone. I do not think it wise that we add these ministerial duties, important though they may be, to the already existing burdens of the District Judge himself. . . .

Much of what I have said in favor of the use of Commissioners applies with equal force to the use of the enlarged Commissioner, termed “Magistrate” in the bill submitted. The cardinal considerations involved, from the standpoint of the District Judge, are the more expeditious disposition of litigation consistent with due process, and the conservation of the time of the District Judge. In my judgment the proposed bill is helpful in both of these considerations.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 3475, Proposals to Reform the United States Commissioner System*, 89th Cong, 2nd sess., 1966, 198–200.]

George Cochran Doub, Expanding Criminal Jurisdiction of Commissioners, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, February 8, 1966

George Doub, a former assistant attorney general of the United States and U.S. attorney from Maryland, came before the Tydings subcommittee to argue in favor of expanded criminal jurisdiction for commissioners. Citing the trivial nature of many minor federal offenses, Doub advocated allowing commissioners—who already could hear matters involving petty offenses committed on federal property—to hear all such matters regardless of their geography. He pointed out that many states already employed summary procedures for minor violations of the criminal law that were “beneath the dignity” of the trial courts. Doub also dismissed the notion that such expanded jurisdiction would be an unconstitutional delegation of the Article III judicial power, citing the Supreme Court’s recognition that historically, petty offenses defined by the common law were handled by judicial officers other than judges.

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I wish to explain the desirability of eliminating minor criminal cases from the district courts and conferring jurisdiction to try them upon specially appointed commissioners. . . .

More than 30 percent of the commissioners have been authorized by the district courts to try petty offenses committed upon Federal property. . . . Most petty offense matters tried before commissioners stem from infractions of Federal law committed on

Federal reservations, national parks and forests, Federal highways and on other Federal property. . . .

It is believed that in each year over 2,000 petty Federal offenses are committed outside of Federal property and comprise at least 7 percent of the criminal prosecutions in the Federal district courts. . . .

The burden of such cases upon the district courts seems onerous when contrasted with their significant judicial work, and it is difficult to escape the conclusion that the requirement that alleged offenders be tried in a formal criminal court of record with or without jury, may be a waste of the legal ability and learning of district judges.

Not only comparable minor criminal cases but ones of far more importance are deemed beneath the dignity of State courts of record and accordingly are delegated under State law to local magistrates or justices of the peace. There has been a “clear and unbroken practice” of centuries in England, the American Colonies and the States distinguishing minor misdeeds from serious offenses and establishing summary procedures for the trial of these minor offenses before magistrates without a jury. . . .

Throughout the history of our country the States have recognized that State petty offenses were unworthy of the dignity of their trial courts of general jurisdiction and such offenses should be tried before State justices of the peace unless the accused elects a court trial. The State magistrate systems throughout the United States accord recognition to the fact that persons generally charged with a minor offense prefer the prompt disposition of their case before a State magistrate rather than a circuit court trial involving substantial expense, delay and publicity. State magistrates dispose of tens of thousands of minor crimes annually and the number of appeals are comparatively so few in number as to suggest general satisfaction with the State magistrate systems.

There is no more reason for minor Federal offenses to be tried in Federal district courts than for minor State offenses to be tried in State courts of general jurisdiction. Actually all of the reasons for the trial and disposition of State misdemeanors before State magistrates would seem to apply with even greater force to the desirability of comparable Federal offenses being tried before Federal magistrates. Federal petty offenses have no more claim to sig-



nificance, morally or legally, than State petty offenses. The press seems to treat every trial in the Federal district courts, however inconsequential, as “a Federal case” and as a consequence, if one is tried in a Federal court for having four shells in an automatic shotgun in a duckblind instead of the permissible three, or three ducks in possession instead of the permitted two or if a duck hunter shoots over a few grains of corn, the publicity can almost equal that of a Mann Act or a tax evasion charge. . . .

Accordingly Federal court trial of these minor misdeeds, involving excessive publicity, expense and delay, is actually oppressive rather than beneficial to defendants. . . .

It seems clear that there is no constitutional impediment which would prevent Congress from authorizing commissioners to try petty offenses committed outside Federal enclaves. The Supreme Court has recognized the historical basis warranting special treatment of petty offenses and not only excluded petty offenses from the guarantee of trial by jury but from the requirement of article III, section 2, of the Constitution that “the trial of all crimes shall be by jury.” . . . However, to eliminate any conceivable objection to the proposed expansion of commissioner jurisdiction over petty offenses, it may be desirable that upon appeal to the district court from a conviction by a commissioner of an offense committed outside a Federal area there be accorded a trial *de novo*.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on the United States Commissioner System*, 89th Cong., 2nd sess., 1966, Part 3, 229–232.]

### Representative William Cahill, Opposition to Delegation of Judicial Power to Magistrates, House of Representatives, Speech of September 18, 1968

U.S. commissioners were responsible for administering certain pre-trial procedures in criminal cases, but the proposed scheme to replace the commissioner system included provisions for magistrates to take on additional responsibilities, including pretrial procedures in civil cases and hearings on post-conviction habeas corpus petitions. The proposed expansion of commissioners' duties led some critics to object that magistrates would be “assistant judges” appointed not by the president, but by other judges.

Representative William Cahill of New Jersey asserted that the proposed magistrate system entailed an unconstitutional delegation of the judicial power to officials not cloaked with the tenure and salary protections of Article III. Cahill was also concerned that allowing district judges to appoint the magistrates threatened to subject the district courts to partisan political influence. Cahill favored helping the courts meet their demands by creating more Article III judge-ships to be filled with presidential appointees.

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My friends, if we in this Congress ever permit the Federal judiciary to involve itself in the party politics, if we ever interfere with the lifetime appointment and the constitutional protection against diminution of salary for Federal judges, and if we ever tamper with the right of the President of the United States, whether he is a Republican or a Democrat, to appoint after consultation with the U.S. Senate, a member of the Federal judiciary, we are taking the high road to the deprivation of the liberty of the citizens of this country.

I realize that this bill is being represented as something far and apart from appointment of Federal judges, but let me tell you, if I may, a few of my observations:

The magistrate that is going to be appointed is not going to be appointed by the President. He is going to be appointed by the district judge. Now, you are all realistic, pragmatic politicians, and you know that if there is a job open that is going to pay \$22,500, somebody in politics in some party is going to start recommending to some judges that they make certain appointments. And I have found, in some instances—that when a man is appointed to the district court bench of the United States his ambitions do not stop. . . .

He wants to go to the court of appeals. Then when he gets to the court of appeals, he begins to dream of Washington and the Supreme Court of the United States, just like you and I dream of advancement in our careers. . . .

So that politics is always in the shadows, and if we permit the Federal judges to have the power of appointment of political appointees, we are tempting them to become involved with party politics. We should not place this burden on them.

You will say “Honestly, what difference does it make? They do not have anything serious to do.” But my friends this is not so; they do. They can hear criminal cases where a defendant can be sentenced up to 1 year in a Federal penitentiary.

It is going to be argued, “Well, any defendant has a right to insist upon a judge; he does not have to accept a hearing before the magistrate. He can refuse to waive.” . . .

Most of the Members, I believe, whether they are lawyers or not, will appreciate that if a defendant is told by a U.S. attorney, “Look, my friend, you can have this criminal case disposed of by a magistrate, or if you want to you can insist upon going before the judge.”

I think the message can be made pretty clear to that defendant that it would not be wise to take the valued time of a judge, and that prudence would dictate he let the magistrate dispose of his case.

It seems to me that an inordinate and unconstitutional duress would be placed upon any defendant if he were asked to sign that waiver. Personally, I do not think he can constitutionally sign it, because I think this is a right of society—the right to be tried before a judge who is provided for by the Constitution of the United States. . . .

I believe this bill is a real effort to provide more help to dispose of cases that are pending in the U.S. courts, both criminal and civil. It is an attempt to provide the Federal judges with assistant judges. It gives the judge, and I call your attention to these words—it gives the Federal judge the right to assign to the magistrate any matter “not inconsistent with the Constitution of the United States.”

It seems to me what we are doing here, in effect, is giving the Federal courts more manpower to dispose of more criminal and civil cases.

If that is what we want to do, I would support it. But I would not support it by this method—I would support it by having the President of the United States appoint whatever judges are deemed to be necessary.

So long, my friends, so long as you permit a district court judge to appoint a man at a salary up to \$22,500 a year for a period of 8 years—so long as you do not put any limit on the number of those appointments that he may make—what you are going to

find, if I know anything about human nature, is that Federal judges will assign more of the work of the courts to the magistrate.

This, in my understanding of the Constitution, is a complete delegation of judicial authority and is completely violative of the Constitution of the United States.

[Document Source: *Congressional Record*, 90th Cong., 2nd sess., 1968, 114, pt. 21: 27329.]

Charles R. Halpern, Fear of Coercion of Parties to Submit Cases to Magistrates, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, June 8, 1977

When in the late 1970s Congress began to consider expanding magistrates' jurisdiction by explicitly allowing them to hold civil trials with the parties' consent, public interest attorneys feared that their clients, many of whom were poor, might be coerced to accept trial before a magistrate rather than an Article III district judge. Charles R. Halpern, a practicing attorney who founded the Council for Public Interest Law in 1975 (later renamed the Alliance for Justice) objected to a provision in the bill that invited district courts to designate particular classes of cases as ones which should primarily be tried by magistrates. After hearing concerns about coercion from a series of witnesses, the Senate added language to the bill it ultimately passed that "the court shall not attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate." The result was to weaken district judges' control over the implementation of the magistrate system.

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[The Department of Justice magistrate bill] S. 1613 clearly is not a minor bill. It would basically change the way the federal courts have traditionally related to one another. . . .

We believe that S. 1613 as presently drafted presents an acute danger that counsel and litigants may frequently be coerced to waive their right to trial before a district judge and accept trial before a magistrate with its more limited right of appeal. We are concerned that overworked judges may be tempted to convert their consent to the trial of a case before a magistrate into what amounts virtually to a warning to litigants that they do not wish

to have a case litigated before them. This is true in any individual case, but it is particularly true where the judge has “designated” an entire class of cases as one which the judge wishes to have tried before a magistrate.

Among the lawyers who most frequently appear in federal court are those who are representing litigants with claims for relatively small sums under government benefit programs. These lawyers frequently are challenging the correctness of administrative decisions and the legality of agency policies. Because they are so frequently before the courts, the courts are familiar with them and with the class of clients and the sorts of issues they generally represent. Lawyers in such a position are notoriously vulnerable and judges have been known, regretful as it must be to all of us, to use their control over docketing and over the hearing of motions to discipline lawyers with whom they are displeased.

It will take a great deal of courage on the part of a lawyer to advise his client to preserve his right of appeal by rejecting a district judge’s “consent” and insisting upon a trial before the judge. We do not believe the interest of justice will be served by building even the possibility of such an abuse into the law. There seems to be little practical advantage to permitting the district courts to designate entire categories of cases for trial by magistrates. The loss in time and efficiency that will result from parties having to request judicial consent in a particular case impresses us as too minimal in terms of the risk of coercion involved in generic consent. . . .

We recommend that Congress not authorize categorical “designation” of classes of cases for trial by magistrates. Indeed, we recommend that Congress proscribe any indication by a district court of its consent to trial of a case before a magistrate until a desire to waive has been manifested on the record by both parties. We believe that any conversations with the court regarding consent and waiver should likewise be made part of the record.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 1612 and S. 1613, The Magistrate Act of 1977*, 95th Cong., 1st sess., 1977, 137, 141.]

Dennis Sweeney, Opposition to Designating Magistrates to Decide Civil Cases, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, June 10, 1977

The Department of Justice magistrate bill sought to lend congressional approval for expanded magistrate jurisdiction—as many as thirty districts were already allowing magistrates to hear and determine civil cases with parties’ consent—and to give the district courts flexibility in their utilization of magistrates. Public interest lawyers worried that the magistrates would be beholden to the district judges who designated them to hear cases and would therefore lack judicial independence when deciding those cases. Dennis Sweeney of the Baltimore Legal Aid Society contended that magistrates could have their designation to hear civil cases stripped if their decisions were not approved by the district court. Further, the conditions that could be imposed by the courts would vary from district to district, impairing the uniformity that litigants expected from federal district courts.

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The bill allows the magistrate to exercise jurisdiction to decide civil cases when, and if, the . . . District Court “specially designates” him to do so. When the designation occurs it may be “under such conditions as may be imposed by the terms of the special designation” made by the Court. This scheme thus introduces discretion into the system which can easily become unbridled discretion leading to a hodge podge of permutations and combinations in the exercise of civil jurisdiction by the various United States District Courts.

First, the District Court can be selective about which magistrates in its district it chooses to bestow the powers upon. The designation in the bill appears to be personal to the magistrate and nothing in the bill guides the Court in its selection of the magistrates for this power. While hopefully it would not widely occur, the grant or denial of this power could be used by the Court to reward or punish magistrates or to steer certain types of cases away from magistrates whose legal philosophy may differ from the Court’s.

Second, the Court can place “such conditions as may be imposed by the terms of the designation” on the grant of juris-

diction. This language is extremely unclear as to its content and would appear to allow the Court to condition in any fashion its grant of jurisdiction. This would lead to a multiplicity of arrangements in various districts and, perhaps more dangerously, to conditions imposed on the exercise of jurisdiction at the whim of the Judges of the District Court.

Third, a Court can choose not to exercise the power at all and thus have a significantly different system of civil justice than a neighboring or comparable district.

Fourth, it appears that the designation can be withdrawn at any time or that the conditions of the designation can be modified or changed at any time. This leaves the magistrate in the exercise of his power under the thumb of the Court in a much more intimidating way than mere reversal by appeal in a particular case would. Here, if the decisions of the magistrate are not liked by the Court, his power could be limited or curtailed as to civil cases. Thus a litigant before such a judge as provided by this bill, has reasonable cause to question the judge's independence and freedom to exercise his authority.

These questions raise the broad issue of the independence and insulation from pressure of the magistrate. As a society, we have always valued the concept of an adjudicator who is independent of outside influence and whose decisions are reached solely on the merits of the dispute before him. This bill will make magistrates potential final adjudicators of any civil case within the judicial power of the United States District Courts, but it does not provide magistrates any substantial protection from suffering the loss of their jurisdiction, nor does it prevent District Court judges from influencing the magistrate in the exercise of his discretion in a particular case.

In the past, magistrates have traditionally served as assistants to District Court judges rendering valuable help in a subordinate role. They are very much under the control of the Court and the particular judges who comprise the Court. This type of control is necessary where the magistrate is an assistant and the District Court judge retains the decision making authority. If Congress desires magistrates to change their roles and become judges entering final dispositive judgments in civil matters, a statutory mechanism should, to all extent legislatively possible, insure that magistrates

are insulated from all potential outside pressures. Only in this way, can Congress provide litigants with a judge they and society have confidence in.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 1612 and S. 1613, The Magistrate Act of 1977*, 95th Cong., 1st sess., 1977, 209–210.]

Burt Neuborne, Uniqueness of Article III Adjudication, Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, July 20, 1977

In 1977, U.S. Representative Robert Kastenmeier of Wisconsin presided over hearings on a wide range of issues facing the judicial branch and the challenges of preserving access to federal justice. Burt Neuborne, a law professor from New York University speaking on behalf of the American Civil Liberties Union, raised concerns that the devolution of the judicial function to non-Article III judges would compromise the federal judiciary's role as the protector of minority rights. He described Article III adjudication as a unique product of the federal judiciary and argued that magistrates, lacking the prestige and independence of Article III judges, would be inadequate "facsimiles" thereof.

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The special role of the Federal courts over the years has been to provide an insulated forum of excellence where claims which touch majoritarian or powerful interests in a way that would cause those powerful interests to recoil and fight back may be resolved on their merits. Only Federal courts have provided an institutional forum capable of enunciating counter majoritarian doctrine over a sustained period of time. . . .

If you have 500 Federal judges, and if, as I think it is accurate to say, they are screaming for help because they say they are overburdened, how does one respond to that situation?

I think one responds first by recognizing that Federal judges are dispensing a unique product. That unique product is Article III adjudication; adjudication by an insulated official of excellence. Therefore, we must deal with this issue as we would deal



with any conservation problem, any problem in the scarcity of natural resources.

We can, first, attempt to expand the natural resource. . . .

In a country of 200 million people, it is not too much to ask that there be 1,000 Federal officials capable of dispensing Article III adjudication for the resolution of disputes. . . .

The second obvious response to a scarcity problem is substitution. That is the response which the Burger court has urged upon us. It is also the response that the Department of Justice has urged upon us. Their response is, to the extent that the Federal courts are overburdened, simply substitute other forums for them. The other forums can either be State courts, magistrates, or community dispute resolution systems; but substitution, they argue, is an alternative to scarcity.

Now, the only problem with that is that it overlooks the fact that the article III judge, when he or she performs an article III function, is performing a unique function, and that function cannot be substituted by creating or shunting cases to alternative bureaucracies. If you send a constitutional case to a State court, sure, it's there, it is going to be dealt with, but it's not going to be dealt with by an article III judge; and if there is something unique in the way the article III system operates in constitutional cases, you lose that when you send a case to a nonarticle III forum. . . .

I should say a word about the Justice Department recommendation that we use magistrates as a substitute forum, as a kind of alternative forum to dispose of certain cases. Again, there is nothing wrong in principle in using magistrates as para-judges. There is nothing wrong with harnessing that energy to attempt to help a judge carry out the judge's article III functions.

The problem is what types of cases are you going to route to a magistrate, because a magistrate is going to be an article III substitute, without the prestige, without the insulation, and without the tenure of an article III judge. Simply sitting magistrates down in a Federal courthouse does not make them article III judges. The attribute of an article III judge is that insulation combined with the excellence, which is what really makes the article III judge a special figure in American life.

To the extent that the Justice Department's magistrate bill [hopes] to create a corps of magistrates that approaches the lev-

el of excellence of article III judges, it is going to have to spend so much money both for the salaries of magistrates and to provide them with some sort of insulated tenure, that you really are building a facsimile of an article III judge. If we are going to build facsimiles of article III judges, why don't we just go ahead and appoint more article III judges; why have a tier of article I judges who have the same attributes as an article III judge, but who are nevertheless not given the title of an article III judge?

On the other hand, if we are not going to spend enough money on the magistrates to have them approach article III judges in excellence, prestige, and tenure, then it's a shame to send cases to them, because they are not going to dispense justice of the same quality as the article III judge would have dispensed. Thus, to the extent that cases are to be sent to magistrates, if they are cases that do not require the special expertise, the special ability of an article III judge to dispense justice, fine.

I urge the committee, however, before taking any action on any magistrates bill, to scrutinize carefully the categories of cases magistrates are going to be asked to handle. The suggestions abound for sending magistrates habeas corpus cases or sending magistrates social security or discovery in constitutional cases, for giving magistrates factfinding power in constitutional cases. Those are precisely the functions over time that have been the province of an article III judiciary. That is why the article III judiciary has performed as brilliantly as it has. To take those areas away from the article III judiciary and give it to an article I official is to change the nature of the decision process, and inevitably it will change the nature of what comes out of that decision process—to the country's detriment.

[Document Source: U.S. House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, *Hearings on State of the Judiciary and Access to Justice*, 95th Cong., 1st sess., 1977, 119, 121–123.]

Judge Charles M. Metzner, Approval of Expansion of Magistrate Duties, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, March 30, 1979

The House and Senate did not come to full agreement on magistrate legislation by the end of the 95th Congress in 1978. In 1979, the Senate Subcommittee on Improvements in Judicial Machinery held a new round of hearings on magistrate reform. Judge Charles Metzner of the U.S. District Court for the Southern District of New York, who chaired the Judicial Conference Committee on the Magistrate System, testified before the subcommittee and gave his strong approval of the plan to expand magistrates' duties. Perhaps responding to critiques that the plan entailed an improper delegation of responsibility by judges, Metzner stressed that magistrates were essential assistants to district judges and operated within the district court rather than apart from it. The flexibility magistrates provided, argued Metzner, had proven to be essential to the efficient processing of criminal and civil cases.

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The legislation being considered by the committee today is a logical extension of the development of the Federal magistrate system to date. The increase in the authority of magistrates to try criminal cases will set the boundary of that authority at a familiar benchmark—the distinction between misdemeanors and felonies—and eliminate the artificial category of minor offenses that now exists. Magistrates' exercise of their existing jurisdiction has been highly successful and that success fully justifies the expansion now being considered.

The codification of magistrates' authority to try civil cases is also supported by the existing experience with the utilization of magistrates. By clarifying the uncertainties that exist under current law, the legislation will make the opportunity to proceed before a magistrate a more readily available and more attractive alternative to litigants in all the district courts.

The Federal courts have been very pleased with the increased flexibility which the Federal magistrates system has provided. Moreover, litigants in the Federal courts, through the increasing use of magistrates, are undoubtedly obtaining prompter and

more thorough consideration of their cases than would be possible if magistrates were not available. The fact that magistrates serve as officers of the district courts rather than as judges of separate and independent courts means that these benefits are being obtained without the unnecessary and confusing jurisdictional barriers that have arisen when the role of general trial courts has been divided and parceled out among several courts of limited and specialized jurisdiction. Rather than take that approach, this legislation builds on the development to date of the Federal magistrates system and parallels the use of masters to assist the judges of the English courts. I am convinced that this is the correct approach.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on the Federal Magistrates Act of 1979*, S. 237, 96th Cong., 1st sess., 1979, 11.]

## *U.S. Bankruptcy Judges*

Article I, Section 8, Clause 4, of the U.S. Constitution provides Congress with the authority to establish “uniform Laws on the subject of Bankruptcies throughout the United States.” Congress passed bankruptcy laws in 1800, 1841, and 1867, but each of these acts was short-lived, and it was not until 1898 that a long-lasting statutory scheme was established. For the next eighty years, the only significant piece of bankruptcy legislation was the Chandler Act of 1938, which established bankruptcy court jurisdiction over large corporate reorganizations. Otherwise, the system established in 1898 remained essentially unchanged.

In the late 1960s, with consumer credit widely available and bankruptcy filings increasing rapidly, lawmakers began to explore the possibility of major reform, and in 1970, Congress established the Commission on the Bankruptcy Laws of the United States to examine the bankruptcy system and recommend improvements. The commission’s 1973 report<sup>15</sup> was based in large part on a study published in 1971 by the Brookings Institution, a think tank in Washington, D.C.<sup>16</sup> The

15. *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, Part I, 5–8 (1973).

16. David T. Stanley and Marjorie Girth, *Bankruptcy: Problem, Process, Reform* (Washington, D.C.: Brookings Institution, 1971).

Brookings report made a recommendation, which the commission adopted, for the creation of an executive branch agency to handle those aspects of bankruptcy that did not involve a controversy between parties and could therefore be considered purely administrative, while leaving the bankruptcy judges<sup>17</sup> to handle those matters requiring the resolution of a dispute in a judicial forum.

The commission also advocated a major expansion of the bankruptcy courts' jurisdiction. Under the 1898 law, bankruptcy courts had jurisdiction only over disputes related to property in the debtor's possession at the time of the filing of a bankruptcy petition, while any related matters generally could be heard only by a U.S. district court or a state court. This unwieldy distinction between so-called summary and plenary jurisdiction, and the resulting necessity of conducting litigation in multiple judicial forums (including frequent litigation to determine which court had jurisdiction) in order to resolve a bankruptcy case, caused inefficiency, uncertainty, and delay. The commission aimed to rectify this problem by urging Congress to grant bankruptcy courts jurisdiction over any disputes arising from or related to the bankruptcy, regardless of whether or not the property in question was in the possession of the debtor's estate.

A bill based on the commission's recommendations was introduced to Congress, along with a competing bill drafted by the National Conference of Bankruptcy Judges—whose constituents were angered by the exclusion of bankruptcy judges from the commission—and both the House and the Senate began hearings on the bills in 1975. Both bills called for expanded jurisdiction, as many interested parties agreed that such a reform was needed for the system to function efficiently. The bills diverged on the subject of bankruptcy administration and on how bankruptcy judges were to be appointed. Unlike the commission, which proposed an executive bankruptcy agency, the judges proposed keeping bankruptcy administration entirely within the judicial branch by creating a small bankruptcy branch within the Administrative Of-

17. From 1898 until 1973, the officials presiding over bankruptcy cases, appointed by the judges of the U.S. district courts, were known as "referees in bankruptcy." In 1973, the Supreme Court issued the Bankruptcy Rules and Official Forms, in which it referred to the referees, for the first time, as bankruptcy judges. After that, the terms were used interchangeably until the enactment of the Bankruptcy Act of 1978, in which Congress formally established the office of bankruptcy judge.

fice of the United States Courts. This entity would be assigned certain administrative tasks but would not assume as much responsibility as the executive agency the commission wanted. In addition, while the commission wished to have bankruptcy judges appointed by the president with the advice and consent of the Senate, the judges preferred appointment by the judicial council of each circuit. Both bills contemplated that the judges would serve fifteen-year terms.

The commission and the judges eventually settled on a compromise bill, which was introduced in 1977. The bill did away with the idea of an administrative agency and unlike its predecessor bills, provided that the bankruptcy judges would be presidentially appointed with the tenure and salary protections of Article III of the Constitution. The House passed the bill in 1977, while the Senate ultimately settled on its own version of the bill, which lacked a provision for Article III status, in 1978. In part as a result of the influence of Chief Justice Warren Burger, the bill that emerged after talks between the two houses of Congress followed the Senate proposal and did not provide Article III status for the bankruptcy judges. Burger, like many U.S. district judges, believed that Article III bankruptcy courts would diminish the prestige and threaten the status of existing Article III judgeships.

The Bankruptcy Reform Act of 1978 dramatically expanded the power of bankruptcy judges, giving them exclusive jurisdiction over all cases arising under the bankruptcy laws as well as original, but not exclusive, jurisdiction over “all civil proceedings arising under” the bankruptcy laws or “arising in or related to” a bankruptcy case. The bankruptcy judges were to constitute the bankruptcy court for their district, which was to serve as an “adjunct” to the district court, and were to be appointed to fourteen-year terms by the president with the advice and consent of the Senate. While the Act did not create an administrative agency, it did establish the U.S. Trustee Program within the Department of Justice to oversee some administrative aspects of bankruptcy.

In 1982, the Supreme Court ruled in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* that Congress’s broad grant of jurisdiction to the bankruptcy judges was unconstitutional because those judges were to exercise “the judicial power of the United States” without the

protections of Article III.<sup>18</sup> The Court dismissed as a “facade” the Act’s purported grant of jurisdiction to the district courts rather than to the bankruptcy judges directly.

Congress considered several proposals to address the jurisdictional problems posed by the 1978 Act, including the appointment of bankruptcy judges with Article III status, the appointment of additional U.S. district judges to staff a bankruptcy division of the court and hear other matters as time permitted, and the creation of a bankruptcy administrator to handle routine aspects of bankruptcy while referring disputed matters to the district courts. The Bankruptcy Amendments and Federal Judgeship Act of 1984 ultimately took a different approach. The Act declared each bankruptcy judge to be “a judicial officer of the district court” and gave those judges jurisdiction over bankruptcy matters as well as certain “core proceedings”—defined in detail by the statute—arising from those matters.<sup>19</sup> In noncore proceedings, the bankruptcy judges were empowered to submit proposed findings of fact and conclusions of law to be considered by the district court before it entered a final judgment. The amendments also provided that bankruptcy judges would thereafter be appointed by the judges of the U.S. courts of appeals to renewable fourteen-year terms.

The debate over Article III status was revived once more when Congress created the National Bankruptcy Review Commission in 1994 to recommend legislative amendments. While the commission’s 1997 report came down in favor of Article III bankruptcy judges with pervasive jurisdiction, most in Congress were satisfied with the general framework of the existing system and declined to alter it. As a result, the bankruptcy system retained the form it had acquired through the 1984 amendments.

18. The 1978 Act provided that the new bankruptcy courts were to begin operating on March 31, 1984, but that the existing referees in bankruptcy would be empowered to exercise the Act’s expanded jurisdiction during a transition period beginning October 1, 1979. 92 Stat. 2683–2685.

19. The statute defined fifteen separate categories of “core proceedings,” leaving it to the bankruptcy judge to determine whether a particular proceeding fit one of the statutory categories. Examples of core proceedings included “matters concerning the administration of the estate”; “allowance or disallowance of claims against the estate”; “counterclaims by the estate”; and “orders to turn over property of the estate.” 98 Stat. 340 (1984).

## Brookings Institution, Proposal for an Independent Bankruptcy Administrative Agency, Report of September 1971

A 1971 report by the Brookings Institution, a think tank in Washington, D.C., recommended the establishment of an independent agency in the executive branch to handle most bankruptcy matters. Bankruptcy, the authors asserted, was primarily an administrative rather than a judicial process. An independent agency, they believed, would be able to run the nation's bankruptcy system with more skill and efficiency than would the federal courts. Hindering the courts in bankruptcy administration, the report argued, were inferior methods of personnel selection, a lack of adequate oversight, and a resistance to institutional support from other government agencies. A congressional commission on bankruptcy adopted the Brookings recommendation in 1973.

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The total bankruptcy system gets its job done according to the literal requirements of the law, but it is a dreary, costly, slow, and unproductive process. Compared to what the system might be doing, the present reality is a shabby and indifferent effort. . . .

These shortcomings are a natural result of using a judicial system to try to solve problems that are by nature administrative. The judicial system relies on adversary procedure and on judges who are for the most part not highly skilled in the supervision of bankruptcy matters or in the selection of expert referees. . . .

So widespread and so ingrained are the shortcomings of the present system that radical rather than incremental change is necessary. Tinkering with the Bankruptcy Act or with the budget of the bankruptcy courts will not do the job. . . .

The statute would authorize the President to establish a bankruptcy agency within the executive branch. This organization would do essentially the work now done by the courts of bankruptcy, plus the work of trustees, receivers, appraisers, accountants, auctioneers, and other auxiliary personnel. . . .

Why an agency and why in the executive branch? Why should bankruptcy not be kept in the courts? Retention of this function by the judicial branch is defensible only if bankruptcy is regarded as primarily a judicial function—arranging for, making, and implementing decisions on disputed issues of fact or law between



contending parties. We have seen, however, that bankruptcy problems are in most cases problems of guidance and management. The major need is for speedy, discriminating, understanding processing of about two hundred thousand small, largely uncontested cases each year. This is an administrative function rather than a judicial function, and it should be performed by a staff selected on a merit basis and aided by the most modern records management and data processing methods.

The judicial branch, moreover, emphasizes the independence of the several courts and consequently de-emphasizes central management and services. Patronage (political or personal) is securely established in the judiciary as a method of personnel selection. Scrutiny of judicial branch functions by Congress and by the General Accounting Office has been extremely restrained. The agency is more likely to have efficient, well-controlled administration in the executive branch, where it would be under pressure (as are the present departments and agencies) to make good progress both in program development and in effective management and where it would receive help from the Office of Management and Budget, the Civil Service Commission, and other staff agencies. In the judicial branch the agency would be insulated from (and perhaps resistant to) such pressures and help.

[Document Source: David T. Stanley and Marjorie Girth, *Bankruptcy: Problem, Process, Reform* (Washington, D.C.: Brookings Institution, 1971), 197–200.]

Judge Conrad K. Cyr, Opposition to Separation of Judicial and Administrative Aspects of Bankruptcy, *Commercial Law Journal*, February 1973

Conrad Cyr, who served as a bankruptcy judge for the District of Maine from 1961 to 1981 and later served on the U.S. District Court for the District of Maine, as well as on the U.S. Court of Appeals for the First Circuit, was one of the most outspoken judges regarding proposals to reform the bankruptcy system. Judge Cyr disagreed strongly with the 1971 Brookings Institution report that influenced the report the Commission on the Bankruptcy Laws of the United States released two years later. His main complaint centered on the proposed separation of judicial and administrative aspects of bankruptcy. Feeling that proponents of the plan to create an administrative agency were denigrating the bankruptcy judges as in-

efficient, Cyr also expressed deep reservations about the ability of a large government bureaucracy to achieve significant improvements in this regard. The proposal, in Cyr's view, sacrificed the quality of justice for participants in bankruptcy cases in exchange for the false promise of expediency.

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The generously financed study of bankruptcy administration conducted under the auspices of the Brookings Institution, once looked to with considerable promise, finally emerged in late 1971 bearing the considerable burden of its own unplanned obsolescence. . . .

Among the more controversial recommendations contained in the Brookings report is that which would withdraw from the courts all responsibility for bankruptcy proceedings, except Chapter X, and create instead an independent administrative agency within the Executive Branch. The proposal deserves serious attention, not so much because it has been substantiated, either empirically or logically, but rather because it has not. . . .

Among the more critical deficiencies of the Brookings report on bankruptcy administration is the conspicuous predilection of its authors in favor of centralized executive control of all phases of bankruptcy administration. No less unfortunate was their decision to conduct the discussion of this topic amidst a camouflage of unhelpful labels, such as 'administrative agency' and 'court,' 'hearing examiner' and 'judge,' and then by some impenetrable process of rational legerdemain to equate 'administrative agency' and 'hearing examiner' with efficiency, speed and economy of administration, while gratuitously denigrating the judicial process as inevitably inefficient and ineffective. . . .

One can readily catalogue examples of excessive bureaucratic delay, expense, inefficiency and unresponsiveness on the part of various administrative agencies, especially those charged with regulating and alleviating consumer needs and problems. . . .

The Brookings findings, however scientifically unexceptionable they may or may not be, rest exclusively upon standards of systems analysis devised by a technocratic elite. The cardinal value implicit in the analytical standards selected is that of *operational efficiency*. The Brookings report is essentially a 'time and mo-

tion study' rather than a goal oriented appraisal of our present and future insolvency systems. Its preemptive concern for increased operational efficiency, if given sway, would diminish dangerously the human and societal relevancy of our insolvency system *by ignoring the perceived needs and values of those who provide and those who receive its services.* . . .

*In my judgment it would require formidable effort to contrive a more regressive recommendation for effective consumer insolvency relief and rehabilitation than the erection of yet another doubtlessly impervious vertical bureaucracy.*

[Document Source: Conrad K. Cyr, "The Abandonment of Judicial Administration of Insolvency Proceedings: A Commitment to Consumer Disservice," *Commercial Law Journal* 78 (February 1973): 37-38, 40.]

### Commission on the Bankruptcy Laws of the United States, Need for a Bankruptcy Administrative Agency, Report of July 31, 1973

When the commission issued its report, it echoed some of the main elements of the Brookings Institution report released two years earlier. Perhaps most importantly, the commission agreed with Brookings on the need for an administrative agency within the executive branch that would handle all aspects of bankruptcy not involving a dispute between the parties. In part, the commission was motivated by a desire for greater efficiency and economy. Equally important, however, was the commission's view that the existing system presented an unacceptable risk of conflicts of interest. For example, a trustee might appear as a party to a legal controversy before the bankruptcy judge who had appointed him or her. Such an arrangement could cause legal adversaries of the trustee to doubt the impartiality of the judge, thereby casting doubt on the fundamental fairness of the bankruptcy system. If a separate administrative agency were responsible for appointing trustees and carrying out other routine functions, the potential for this type of conflict would be eliminated.

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The Commission recognizes that under the present Act a great part of the work of the bankruptcy system is administrative rather than judicial in character. . . .

When litigation does arise, there are substantial reasons for not entrusting its determination to bankruptcy judges involved in the prior administration of these litigated estates. It is necessary and important that the adversaries have confidence that their controversy will be determined by evidence adduced by them and presented to the trier of the law and the facts. The Commission is convinced that referees' participation in administrative aspects of bankruptcy proceedings tends to impair the litigants' confidence in the impartiality of the tribunal's decision. In particular, adversaries of the trustee in bankruptcy tend to doubt that the referee who appointed the trustee can insulate himself from at least a suspicion of partiality when he may have previously been involved in any or all of the following actions regarding the same estate: determining that the debtor had committed an act of bankruptcy; the appointment, or approval of the election, of the trustee; the scrutiny of the petition, schedules, statement of affairs, and other papers filed in the case; the conduct of the first meeting of creditors and other meetings at which examination of the debtor and other witnesses took place; and conferences with the trustee regarding collection of the assets of the estate and litigation on its behalf.

These considerations have led the Commission to recommend the severance of administrative from judicial functions within the bankruptcy system. Under the proposed Act, administrative responsibilities would be carried out by an agency established by Congress for the purpose. Judicial functions would be performed by bankruptcy judges appointed to bankruptcy courts also established by the Act. It is the view of the Commission that this division is no less necessary in this area than it is between the Internal Revenue Service and the Tax Court.

The bankruptcy courts created by the Act would be United States courts modeled in most respects on the existing bankruptcy courts with expanded jurisdiction. The bankruptcy judges would be appointed by the President of the United States by and with the advice and consent of the Senate, rather than by the United States district judges. . . .

Specifically, to implement these objectives, the Commission recommends (as set forth in the proposed Bankruptcy Act of 1973) that:

- (1) New bankruptcy courts be created to have jurisdiction of all controversies arising out of a proceeding under the Act and all controversies between a trustee in bankruptcy on behalf of the estate and any third party. These courts would have no significant administrative functions in the absence of a litigable controversy. . . .

The counterpart of the courts described above would be a Bankruptcy Administration empowered to handle almost all matters in proceedings under the Act which do not involve litigation. The Administration's jurisdiction, then, would encompass the routine cases initiated in its offices which involve no litigation, as well as all administrative matters in cases where litigable issues do arise. This part of the bankruptcy system would be staffed by permanent employees selected by merit and compensated by a rating system. Their duties would include many of those presently undertaken by the referees, trustees, receivers, auctioneers, appraisers, accountants, and attorneys. . . .

The benefits to be derived from such a nationwide organization in place of the local referees and the private trustees largely immune from any effective control are manifold. Most importantly, it is reasonable to expect that administration of the Bankruptcy Act would, for the first time in history, become reasonably uniform throughout the United States. Secondly, and of perhaps equal importance, economies should be possible for such an organization which would greatly reduce the administrative expense of a bankruptcy proceeding—for example, by the centralized data processing of records and notices for cases throughout the country; by the use of salaried personnel to dispose of assets at the best available price through a coordinated, nationwide system; and through the investment of funds held pending distribution, which in the aggregate on a nationwide basis are very substantial, although with respect to one single case administered by a private trustee may not be large enough to justify the effort.

In addition, the Bankruptcy Administration would provide to individual debtors the budget and other counseling which is necessary to give them any meaningful relief from their economic predicaments.

[Document Source: *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93–137, Part I, 5–8 (1973).]

Judge Conrad K. Cyr, Disregard for Dollar Value in Determining When Judicial Resolution Is Necessary, *American Bankruptcy Law Journal*, Spring 1975

Bankruptcy judge Conrad Cyr, who in 1973 had spoken out vociferously against the creation of an administrative bankruptcy agency, seemed to have softened his position somewhat by 1975. Judge Cyr recognized that some separation of administrative and judicial functions was desirable, particularly with respect to the appointment of trustees. The bill proposed by the bankruptcy judges, however, would have kept administrative control over bankruptcy in the judicial branch, rather than in an executive agency, as the commission recommended. While acknowledging that greater efficiency in the handling of bankruptcy cases was attainable, Cyr cautioned against allowing only high-stakes cases to be heard in court, noting that the dollar value attached to a case was not determinative of whether resolution in a judicial forum was warranted or necessary.

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The first major proposal put forward by the Commission, and one with which the National Conference of Bankruptcy Judges agrees in principle, involves the *separation of the 'administrative' from the 'judicial' functions* in bankruptcy administration. In our opinion there can be no substantial doubt about the need to *relieve the judge of the bankruptcy court of responsibility for the appointment, supervision, and compensation of fiduciaries* who administer bankruptcy cases, particularly since those fiduciaries constantly appear before the court as litigants in contested matters. . . .

The differences of the bankruptcy judges with the Commission in this connection are definitional as well as philosophical. The congressional resolution of those differences ultimately will determine the appropriate placement of administrative responsibilities

within the future bankruptcy system—whether in an independent executive agency, as urged by the Commission; whether in a separate administrative agency within the Judicial Branch, as we propose; or whether, as others suggest, within an upgraded administrative arm of the bankruptcy court. . . .

It is also implicit in the Commission recommendations in this regard that there is a great deal of misunderstanding as to the amount of administrative detail with which the bankruptcy judge is actually involved. We do not know of any bankruptcy judge today who does not delegate to the clerks in his office responsibility for the performance of administrative tasks of the type cited by Brookings and the Commission as being representative of the bankruptcy courts' wasteful use of judicial manpower. . . .

Of course, it has been apparent for some time that many unnecessary notices, forms, orders and the like can be eliminated through more efficient court rules and procedures, with no sacrifice of procedural due process. As expected, the recently adopted Rules of Bankruptcy Procedure are working just such results. *On the other hand, if only the resolution of those adversary bankruptcy proceedings which involve 'substantial' dollar amounts is to be considered an appropriate 'judicial' function, as seems to be the Commission presumption, then we must take serious issue with the Commission.*

[Document Source: Conrad K. Cyr, "Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898," *American Bankruptcy Law Journal* 49 (Spring 1975): 121–122.]

Harold Marsh, Conflict of Interest Caused by Bankruptcy Judge Appointment of Trustee, Testimony Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, November 28, 1977

Although both the commission's and the judges' bills first introduced in 1973 contained provisions for the separation of judicial and administrative functions in bankruptcy, the compromise bill that emerged in 1977 abandoned this concept. Harold Marsh, chairman of the commission, complained that the new bill did nothing to resolve the crucial issue of a conflict of interest on the part of a bankruptcy judge who appointed a trustee, worked with the trustee in the course of administering the debtor's estate, and then was re-

quired to hear a controversy between that trustee and a third party. Marsh saw no alternative to the creation of an administrative body separate from the bankruptcy courts if these potential conflicts were to be avoided.

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The most serious criticism that has been levied against the existing system of bankruptcy administration over the years has been that the present system involves an inherent conflict of interests and the serious possibility of prejudice on the part of the official adjudicating controversies between the trustee (or debtor where no trustee is appointed) and third parties, and in any event the appearance of prejudice. The reasons for this criticism were twofold. In the first place, the judge (formerly called referee) frequently appointed the trustee whose controversies with third parties he subsequently adjudicated.

Secondly, the intimate involvement of the judge in the day-to-day administration of the estate, and particularly the conduct of a business where a chapter proceeding is concerned, inevitably tends to make him appear to be the “partner” of the trustee in the attempt to work out a constructive solution to the various problems. The judge constantly receives information in a nonadversary context which may influence his judgment in a subsequent controversy between a trustee and a third party, although it may have been wholly inadmissible in that adjudication and in any event was received entirely without the opportunity for cross-examination by the adverse party. . . .

It should be emphasized that this situation is a fault of the system and not because any Bankruptcy Judge is doing anything improper. On the contrary, these other activities are a part of his job, and he has no choice but to perform them. There is no one else to do so. Therefore, the only way in which this situation can be corrected is to change the system. Giving the occupants of the bench life tenure will do nothing to correct this problem unless the system is changed. . . .

I would urge your Subcommittee to concentrate its efforts on an attempt to solve this problem. . . . I regret to say, after the labor of seven years (a good deal of which was mine), that if no



improvement is made in this regard in H.R. 8200, I would have to recommend that your Subcommittee disapprove the Bill.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2266 and H.R. 8200, The Bankruptcy Reform Act of 1978*, 95th Cong., 1st sess., 1977, 481–483.]

Judge Homer Drake, Opposition to Presidential Appointment of Bankruptcy Judges, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, February 20, 1975

In addition to their disagreement on the issue of an administrative agency, the bankruptcy judges and the commission had differing views on how bankruptcy judges should be appointed. Some senators, such as Quentin Burdick of North Dakota, felt that presidential appointments with the advice and consent of the Senate—the same method by which district court and circuit court judges as well as Supreme Court justices were appointed—would elevate the status of bankruptcy judges and attract more qualified candidates to the bench. The existing bankruptcy judges preferred appointment by the judicial councils of each circuit, however. Bankruptcy judge Homer Drake of the Northern District of Georgia explained that in addition to the delay they would impose in the appointment of new judges, presidential appointments would inject politics into the process, thereby disadvantaging existing judges who had by necessity avoided politics and potentially making it more difficult for them to secure reappointment.

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Senator BURDICK. . . . Judge Drake, the witnesses for the Commission yesterday indicated that they believed appointments of judges to this new court should be made by the President. I believe it is the position of the judges that this appointing power should be lodged with the circuit judges of each circuit.

Why do you believe the President should not be given the appointing authority?

Judge DRAKE. All right, sir, first of all, as Judge Cyr mentioned in his opening statement, bankruptcy matters need immediate attention, and to fill a vacancy in the present way on the U.S. district court bench or the U.S. circuit court bench sometimes takes many

months. There is also another factor I would like to mention. To insert this political factor into the system of selection of bankruptcy judges will, we believe, be totally unfair to those bankruptcy judges now sitting; judges who, because of having been on the bench a number of years, were and are simply prohibited from participating in politics; and even though they are extremely well qualified, they may be unable to compete politically with a prospective candidate who the political party that happened to be in power would like to have on the bench.

And we believe very strongly that these judges are entitled to protection of some kind from political interference, and if this can be accomplished—and we believe it can be by a method we have in mind—then perhaps the selection of new judges in the future by the political process would be more acceptable.

Senator BURDICK. A number of years ago, during the period that Judge Cyr was talking about, the referees were known as referees, and they wanted this title of judges in bankruptcy, and now you got it, and I think it is very fine. I was for it. Does not a certain amount of prestige go with the title of judge? Do you not think you would get a better—using the other argument that people might seek this knowing that it was a prestigious position?

You had to have an appointment from the President of the United States, approved by the Senate. Does not it give you an elevation that you would not ordinarily have?

Judge DRAKE. I think that may be true; but also, Senator, I am sure I reflect the views of our conference when I say that these judges, these qualified judges, already on the bench deserve some protection from the ordinary political process.

Senator BURDICK. Well, now, that is a different question.

Judge DRAKE. Now, new judges appointed by the President, yes. I can see your point of view. When vacancies come about by reason of attrition, retirement, death, and so forth, appointment by the President may very well be desirable to attain the sufficient stature which we all envision for this new court.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 235 and S. 236, The Bankruptcy Reform Act*, 94th Cong., 1st sess., Part 1, 1975, 117.]

Judge John T. Copenhaver, Support for Expanded Bankruptcy Jurisdiction, Testimony Before House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, July 10, 1975

John Copenhaver, who served as a bankruptcy judge in the Southern District of West Virginia from 1973 to 1976, and thereafter as a judge of the U.S. district court, spoke to Congress in support of expanded bankruptcy jurisdiction. According to the judge, the resolution of bankruptcy cases was being hindered by the narrow jurisdictional limits imposed on the bankruptcy judge, who was permitted to hear only disputes involving property in the debtor's possession unless the creditor consented to jurisdiction over other matters. Bankruptcy judges were frequently required to hold a trial on the issue of jurisdiction prior to hearing a case on its merits, or to refer the matter in question to a state court (or a U.S. district court) that would not have as much incentive to resolve the issue quickly, so that the entire bankruptcy case could be settled. Under the proposed law, bankruptcy judges would have clear jurisdiction over all matters arising from or related to the bankruptcy case—called “pervasive jurisdiction”—thereby eliminating lengthy and costly disputes over where such matters should be heard.

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[T]he bankruptcy court's jurisdiction presently is based on either possession or consent. If the bankrupt has possession of an asset at the outset of the proceeding, when it is filed, then the court has jurisdiction to determine all disputes which arise or may arise with respect to that particular asset.

In addition, even though the bankruptcy court does not have possession of the asset, if the creditor either expressly consents or by taking some action in the case is deemed to have consented to the court's jurisdiction, the court hears the matter.

Under the proposed act, no longer would the court's jurisdiction be dependent upon questions of possession or consent, but rather the court would have the jurisdiction to determine the matters independently. . . .

Now, under the new act the bankruptcy court, as it would be constituted, would then . . . possess pervasive jurisdiction with respect to all of these matters. It would, in effect, possess jurisdiction to decide any controversy that would be necessary to the

settlement of the estate. By according the bankruptcy court that jurisdiction it will simply mean that the bankruptcy court has been relieved on the one hand in a number of cases, particularly fraud cases, of having to try a case twice, once to determine whether it has jurisdiction, and the other to determine the case on the merits. . . .

Under the proposed act, the bankruptcy court would be accorded jurisdiction, of course, from the outset, and know that it held that jurisdiction from the outset. But what happens now too frequently is that the court, as it may when it is confronted with a question of that nature simply remits the matter to another State or Federal court which unquestionably would have jurisdiction over the matter. What happens in turn is that many cases which ought to be heard, and would be heard in the bankruptcy court, hearing them expeditiously so that the entire estate might be closed promptly, are allowed to linger on the State court calendar for years and years without action. Frequently the State courts are not as interested in disposing of these matters as is the bankruptcy court.

The State court is not charged with the duty of seeing to the prompt administration of the estate, whereas the bankruptcy court is, so that very often those cases are allowed to languish without action for a considerable period of time. The result is that many disputes, whether to recover accounts receivable or otherwise, and which ought to be heard with promptness within the framework of a single court sitting in bankruptcy, are either settled by the trustee for a pittance, or they are abandoned entirely rather than risk the costly delay to which that litigation is usually subjected in a nonbankruptcy forum, which so often is lacking in enthusiasm for bankruptcy cases in particular, and the complexity and apparent novelty of bankruptcy disputes in general.

[Document Source: U.S. House of Representatives, Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, *Hearings on H.R. 31 and H.R. 32, Bankruptcy Act Revision*, 94th Cong., 1st sess., Part 1, 1975, 140, 144–145.]

Ad Hoc Committee on Bankruptcy Legislation of the Judicial Conference of the United States, Opposition to Expanded Bankruptcy Jurisdiction, Testimony Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, November 28, 1977

The Judicial Conference of the United States, the governing board of the federal judiciary in administrative matters, was one of the few interested parties to oppose the idea of having the bankruptcy judges constitute a separate court with expanded jurisdiction. The Conference's ad hoc committee pointed out that giving bankruptcy judges the power to hear any matter arising from or related to a bankruptcy case meant that bankruptcy judges would have jurisdiction over any type of civil case, in effect creating two completely separate systems of district courts and resulting in inefficiency, confusion, and waste.

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The Commission on Bankruptcy Laws has pointed out that most of the work of the Offices of referees in bankruptcy is administrative in character. The Commission endeavored to classify those functions which are administrative and those that are judicial in character, but there appears to be no unanimity of opinion on what is administrative and what is judicial. Nevertheless the Commission advocated a separation of the administrative and judicial functions of referees. In order to effect separation the Bankruptcy Commission proposed the creation of a separate "bankruptcy administration" and the establishment of a "separate court" with expanded jurisdiction over "plenary suits". The expanded jurisdiction would include jurisdiction of all cases and controversies "arising under or related to" the pending bankruptcy case. The Commission felt that this arrangement would expedite the administration of estates and minimize controversies over questions of summary and plenary jurisdiction. The new court was visualized as a specialized court for bankruptcy.

The Judicial Conference and the Ad Hoc Committee respectfully disagree with this concept. First of all, a separate court would not really be specialized. Its jurisdiction would extend to every type of civil action in which a bankrupt estate might conceivably be involved. Through a grant of "plenary" jurisdiction

the new court could hear and determine tort cases, contract cases, admiralty cases, antitrust cases, patent suits, and every type of case over which federal courts now have jurisdiction, except criminal cases. Furthermore the new court would interpret and apply state law, although state courts alone can finally determine state law. In effect there would be two United States district courts in each district, one for solvent litigants and one for cases involving insolvent litigants. There would be concurrent and overlapping jurisdiction. There would be two separate clerks' offices in each district, each maintaining separate records, and members of the public would be inconvenienced by having to search records in two courts rather than one. There would be a duplication in the administration of the jury system in each court. All of this is contrary to the principle of a "unified" trial court system strongly advocated by the American Bar Association and embodied in the Standards Relating to Court Organization which were developed by the American Bar Commission on Standards of Judicial Administration.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2266 and H.R. 8200, Bankruptcy Reform Act of 1978*, 95th Cong., 1st sess., 1977, 369.]

Attorney General Griffin B. Bell, Opposition to Creation of Article III Bankruptcy Courts, Testimony Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, November 29, 1977

Like the Judicial Conference of the United States, the Department of Justice opposed granting bankruptcy judges the tenure and salary protections of Article III. Like many of the existing federal judges, the Justice Department took the position that such a move would diminish the prestige of the U.S. district courts. Unlike the Judicial Conference, however, the department foresaw potential constitutional problems with an independent bankruptcy court that was not created pursuant to Article III. As Attorney General Griffin Bell explained, the department's preferred solution was a bankruptcy court that would have expanded jurisdiction, but would operate as an adjunct of the district court rather than independently. This was the approach that Congress took in the 1978 Bankruptcy Reform Act, and of which the Supreme Court soon after disapproved, asserting

that the adjunct bankruptcy courts exercised essential attributes of the judicial power “behind the facade” of a jurisdictional grant to the district courts.<sup>20</sup>

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I must emphasize at this point that the Department of Justice remains firmly opposed to the creation of Article III bankruptcy courts, courts which would not only parallel our U.S. district courts, but would, under some proposals, actually have more jurisdiction than our district courts. To create a second nation-wide system of tenured judges to parallel the existing district court system would, in our opinion, be the most fundamental change to our Federal court system since it was created in 1789. The judicial power of the United States under Article III of the Constitution should be exercised by a unitary system of courts of general jurisdiction—we have that system, the U.S. district courts. The price of bankruptcy reform should not be the diminution of the prestige and influence of our district courts.

Although the Department of Justice believes that a nontenured or Article I court raises constitutional questions, and, although we cannot support an independent tenured or Article III court for what I regard as sound policy reasons, we can support a bankruptcy court with new and expanded powers and resources that will, however, continue to operate as an adjunct of the district court.

Title II of your bill, S. 2266, does just that. The district courts would continue to have jurisdiction over bankruptcy matters, and the bankruptcy statute would continue to use the word “court” for reference to either the district court or the bankruptcy judge, the term “referee” being abandoned. But the bankruptcy judge would be upgraded and the appointing-reviewing authorities separated by proposed section 771 to title 28, U.S.C., which would authorize the judicial council of each circuit to appoint bankruptcy judges to twelve year terms to serve in each district of the circuit in numbers and at such locations as the Judicial Conference of the United States determines. Although the bankruptcy judges would

20. *Northern Pipeline*, 458 U.S. at 86.

not have the power to enjoin a court and contempts would constitute contempt of the district court, the bankruptcy judge would be empowered to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the new title 11. A bankruptcy judge would be entitled to sit on the Board of the Federal Judicial Center.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2266 and H.R. 8200, Bankruptcy Reform Act of 1978*, 95th Cong., 1st sess., 1977, 544.]

### National Bankruptcy Review Commission, Advocacy for Creation of Article III Bankruptcy Courts, Report of October 20, 1997

In the late 1990s, some bankruptcy experts called once again for the creation of Article III bankruptcy judgeships. Congress created the National Bankruptcy Review Commission in 1994, directing it to prepare a report on the advisability of various proposals to amend the bankruptcy system. In its instructions to the commission, Congress advised that it was “generally satisfied with the basic framework established in the current Bankruptcy Code,” and not seeking an overhaul of the existing system. Nevertheless, in its 1997 report, the commission urged Congress to grant pervasive jurisdiction over all bankruptcy-related matters to bankruptcy judges appointed pursuant to Article III. Echoing critics of the earlier distinction between summary and plenary jurisdiction, the commission decried the “procedural morass” caused by the 1984 Act’s core/noncore dichotomy.

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The bankruptcy court should be established under Article III of the Constitution.

The attempts in the 1970s and 1980s to increase the efficiency and enhance the reputation of the bankruptcy courts should be continued in the 1990s. It is not merely a matter of cosmetics or appearance. The present bankruptcy system comes into contact with more individuals and entities and handles more money than the rest of the federal court system combined. The soundness and efficiency of the bankruptcy system is therefore paramount. Two reforms will greatly enhance the efficiency and reliability of the present system. These reforms are (1) granting bankruptcy judge-



es Article III status, and (2) giving the bankruptcy court unfettered, pervasive jurisdiction over any matter related to a case filed under the Bankruptcy Code. . . .

The key to efficiency in bankruptcy is speed and finality. Resources in bankruptcy are limited and creditors bear the cost of administration. Under the current core/noncore system, disputes over the jurisdiction of the court can take years. Extended litigation over the jurisdiction of the court with no determination on the merits of a dispute diminish the creditors' recovery. . . .

Article III status will also . . . promote the goal of achieving a high quality judicial system. Critics of the current system argue that bankruptcy judges are too debtor-oriented and as a result the system is too insular and self-referential. Article III status may address some of these concerns. Lifetime appointment may encourage and provide an incentive for high quality generalists who will bring a generalist perspective to the whole system to seek bankruptcy judge appointments.

The net result would be a more prestigious, more efficient court authorized to resolve quickly and completely all in a single setting the proceedings that come before it. . . .

The procedural morass of the bankruptcy judicial system is extraordinarily costly and inefficient. The cost is borne by creditors, debtors, and the court and its administration. Article III status is not a panacea, but it is a miracle cure for the majority of jurisdictional ills that currently afflict the bankruptcy court. It would not relieve the system of a motion raising the basic jurisdiction issue, *i.e.*, "related to" jurisdiction. It would, however, relieve it of all of the other jurisdictional motions which would eliminate a great deal of expense for the estate, the creditors, interested third parties, and the system itself in terms of court and administration time.

[Document Source: *Bankruptcy: The Next Twenty Years*, Final Report of the National Bankruptcy Review Commission (1997), 721–724, 742.]

Susan Block-Lieb, Advocacy for Article III Status and Expanded Jurisdiction for Bankruptcy Judges, *American Bankruptcy Law Journal*, Fall 1998

A law professor at Seton Hall University, Susan Block-Lieb wrote in support of the commission's position that bankruptcy judges should be granted the protections of Article III, so they could exercise the pervasive jurisdiction envisioned by Congress in the 1978 Act. Block-Lieb asserted that Congress had refrained from granting Article III status in the past because Chief Justice Warren Burger had convinced lawmakers that such a plan would diminish the prestige of the U.S. district courts. Finding this argument to be of dubious validity, she asserted that the goals of expediency and efficiency in the bankruptcy system could be achieved only by resolving the jurisdictional ambiguities that had motivated reform in the first place.

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This Article presents the case for an Article III bankruptcy court system. It argues that the Commission was right in acting proactively on the subject. Even in the absence of crisis, reform is justified because the current bankruptcy jurisdictional system does not work well. Rather than wait until the old jalopy sputters to a halt, the Commission acted wisely in recommending to Congress that it create an Article III bankruptcy court. It acted wisely because the costs of the current bankruptcy court system—the costs to the litigants and to the judicial system associated with keeping the old jalopy running—are greater than the costs of a new one. In this instance, “costs” may be perceived as an imprecise and possibly misleading term, certainly difficult if not impossible to quantify in any meaningful sense. But, although such costs defy precise accounting, they are neither insignificant nor unimportant and they should not be ignored. . . .

Dividing jurisdiction between district and bankruptcy courts slows down the resolution of bankruptcy cases involving litigated disputes for two reasons.

First, the division gives parties an additional layer of procedural issues for litigation. The statutory authority of bankruptcy judges to exercise bankruptcy jurisdiction depends on whether a proceeding is core or noncore. This distinction must be drawn in every litigated proceeding in order to delineate the breadth of the

judicial authority of the bankruptcy court and is complicated both as a matter of statutory construction and as a matter of constitutional theory. . . .

Second, even if courts were to clarify these provisions by resolving the difficult constitutional questions they present, the division of bankruptcy jurisdiction would still postpone resolution of bankruptcy cases because litigation conducted in multiple fora is more time-consuming and expensive for the debtor than litigation conducted in a single bankruptcy forum. Every time the United States Code or the Constitution requires that a court other than the bankruptcy court exercise bankruptcy jurisdiction, resolution of a bankruptcy case is made slower and more expensive. . . .

If bankruptcy judges are not granted life tenure, if they cannot constitutionally exercise “the essential attributes of judicial power,” then it will take longer and cost more to administer bankruptcy cases than is necessary. . . .

Although Congress conferred on federal district courts an expansive grant of bankruptcy jurisdiction in order to expedite the resolution of bankruptcy cases, its purposes in defining bankruptcy jurisdiction broadly are distinct from the concerns that drove it to authorize the wholesale reference of this broad grant of jurisdiction on non-Article III bankruptcy courts. As to the latter, legislative history indicates that Congress did not confer a broad grant of jurisdiction on non-Article III bankruptcy courts in order to expedite the resolution of bankruptcy cases. Indeed, the delegation of some, but not all, jurisdiction to bankruptcy courts delays, rather than expedites, the resolution of bankruptcy cases. Fractionalizing bankruptcy jurisdiction among life-tenured federal district courts and untenured federal bankruptcy courts directly contradicts the bankruptcy goal of expeditiousness. Instead, following lobbying by the then-Chief Justice of the United States, Congress appears to have been convinced that the creation of an Article III bankruptcy court system would diminish the prestige of the Article III federal district courts. Where politics motivate Congress to refer judicial authority to untenured decisionmakers, separation of powers concerns are heightened. . . .

The relationship between the number of sitting Article III judges and their prestige is, at best, tenuous. As the ranks of district and circuit judges have swelled in the latter half of the Twentieth

Century to accommodate increasing demands on the federal judicial system, existing district and circuit judges did not object to these additions on the grounds that this expansion would dilute their prestige. The complaint that adding tenured bankruptcy judges to the federal system would affect the standing in the legal community of existing district and circuit judges, thus, should be viewed with suspicion.

[Document Source: Susan Block-Lieb, "The Costs of a Non-Article III Bankruptcy Court System," *American Bankruptcy Law Journal* 72 (Fall 1998): 530, 545–546, 562–565.]

Thomas E. Plank, Lack of Necessity for Article III Bankruptcy Judges, *American Bankruptcy Law Journal*, Fall 1998

Thomas Plank, a law professor at the University of Tennessee, argued that Article III status was not necessary to protect the judicial independence of bankruptcy judges. Having bankruptcy judges appointed by the judges of the U.S. courts of appeals, who did enjoy Article III protection, was sufficient in Plank's view to insulate bankruptcy judges from political pressure and influence from interest groups.

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Bankruptcy judges do not have the same protections as Article III judges. Nevertheless, bankruptcy judges may have as much real judicial independence as Article III judges. The institutional arrangements of life tenure and limitation on reduction of salary in the Constitution are not the only ways to preserve judicial independence.

Bankruptcy judges are appointed and reappointed by the court of appeals in their respective circuits. Appointment for limited terms always creates pressures on judges to ensure that their decisions do not displease the people empowered to reappoint them and thus create impediments for reappointment. These pressures are readily apparent in the vast majority of states of the United States in which judges serve for limited terms and are reelected by popular vote.

Nevertheless, appointment of bankruptcy judges by Article III judges reduces the inappropriate pressures that might arise from

limited terms. Reappointment is in the hands of judges who have life tenure, not political bodies like an executive, a legislature, or the electorate. Judges with the responsibility for appointment and reappointment are less likely to be influenced by interest groups dissatisfied with a bankruptcy judge's decisions. In addition, judges are more likely to understand and respect the need for judicial independence and therefore less likely to allow their views of the outcome of decisions of the bankruptcy judge to influence their decision on the question of whether to reappoint the judge.

Similarly, although Congress, a political body, may impeach and remove Article III judges, only the judicial council may discipline and remove the bankruptcy judges in its circuit for misconduct and other causes. Although some believe that supervision of judges by judges impedes judicial independence, giving judges who have life tenure, instead of a political body like Congress, the responsibility for disciplining bankruptcy judges strengthens their independence. As in the case of reappointment, judges on the judicial council are much less likely to be influenced by interest groups dissatisfied with a bankruptcy judge's decisions and are much more likely to respect the need for judicial independence.

Moreover, the appointment and reappointment by the court of appeals fosters another important element of judicial independence—having judges with high qualifications.

[Document Source: Thomas E. Plank, "Why Bankruptcy Judges Need Not and Should Not Be Article III Judges," *American Bankruptcy Law Journal* 72 (Fall 1998): 622–623.]



# Changes to the Appellate System

In the 1960s, judges, lawyers, law professors, and members of Congress were extremely concerned about rising caseloads and their effect on the operation of the federal courts. Much of the focus was on the increased workload of the U.S. district courts, but it did not escape their notice that the U.S. courts of appeals suffered from these pressures as well. Cases filed in all the courts of appeals combined surged from 3,899 in 1960 to 11,662 in 1970—an increase of nearly 200 percent, and then rose almost 100 percent more, to 23,200, by 1980.<sup>21</sup> The courts of appeals responded to this deluge with new procedures that changed the character of appellate justice. Courts reduced the time allotted for oral argument, wrote and published fewer opinions, and increasingly relied on staff to help identify unmeritorious cases.

In an effort to provide some relief to the appellate courts, Congress approved new judgeships in 1961, 1966, and 1968, increasing the total number of authorized appellate judgeships from 68 to 97. Adding new judges, however, came with the risk of unintended consequences. Judges, lawmakers, and others were forced to consider what ever-larger courts of appeals meant for appellate justice in the federal system. They expressed concern that large appellate courts would suffer in terms of collegiality, efficiency, and uniformity of the law within the circuit.

The alternative to larger appellate courts was to divide existing circuits to create additional courts with fewer judges per court. For over a decade, Congress debated proposals to divide the Fifth and Ninth Circuits. But while courts of appeals consisting of large numbers of judges were concerning to some, the possible proliferation of circuits raised a host of new questions. Critics of plans to split the Fifth and Ninth Circuits asserted that appellate courts should encompass a large number of states in order to bring a diverse perspective to appellate cases and overcome local prejudices in the states. The debate

21. Historical caseload data for the U.S. courts of appeals is available on the Federal Judicial Center website, at <https://www.fjc.gov/history/courts/caseloads-u.s.-courts-appeals-1892-2016>. Data for the period in question was taken from the *Annual Report of the Director of the Administrative Office of the U.S. Courts* for each respective year.

was particularly heated in the Fifth Circuit, where some off and on the court worried that splitting the circuit would break up the coalition of judges most staunchly defensive of African American civil rights in the Deep South and thereby threaten a generation of civil rights victories in federal court. Detractors also pointed out that more circuits would lead to more conflicts of legal interpretation among the appellate courts, which the Supreme Court, facing caseload burdens of its own, would not be quick to resolve.<sup>22</sup> The fight over the Ninth Circuit resulted in no change to the status quo, but the Fifth Circuit debate was finally resolved in 1980 when Congress passed legislation to split the circuit in two and create the Eleventh Circuit.<sup>23</sup>

The overriding concern about a lack of appellate capacity also led to proposals for establishing new tribunals to increase the ability of the federal courts to harmonize national law and to relieve the Supreme Court of some of its own caseload burden. A number of bodies, including a group appointed by Chief Justice Warren Burger, called for the creation of a national court of appeals to take over the task of screening petitions for certiorari to the Supreme Court. Subsequent proposals envisioned that the new court would resolve conflicting decisions of the courts of appeals and take cases the Supreme Court referred to it. Those who opposed the creation of a national court of appeals feared that it would cut off almost all access to the Supreme Court by turning it into a body that decided only major constitutional questions. Some raised objections that allowing an intermediate appellate court to harmonize national law would undercut the status of the Supreme Court as the nation's highest court and that the court's judges would not be nearly as qualified as the justices to review petitions for certiorari. Because of such concerns, no bill to create a na-

22. Further background on the debate over splitting the Fifth Circuit can be found in Thomas E. Baker, "A Legislative History of the Creation of the Eleventh Circuit," *Georgia State University Law Review* 8, no. 2 (April 1992): 363–384; Deborah J. Barrow and Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (New Haven: Yale University Press, 1988); and Harvey C. Couch, *A History of the Fifth Circuit, 1891–1981* (Bicentennial Committee of the Judicial Conference of the United States, 1984).

23. Fifth Circuit Court of Appeals Reorganization Act of 1980, 94 Stat. 1994 (1980).



tional court of appeals ever received sufficient support to be voted on by Congress.<sup>24</sup>

Although proposals for a national court of appeals failed by the late 1970s, the drive to establish a new appellate court with jurisdiction defined by subject rather than geography was successful. Supporters of this proposal included many practitioners motivated by a growing concern about the lack of uniformity of decisions in federal law—especially in highly complex areas like patent law, tax law, and appeals from administrative agencies. Judges and lawmakers, however, expressed long-held fears that specialist judges would become sealed off from broader legal experience and that litigation in technical areas of the law would lose the hallmarks of the adversarial legal tradition. Some observers also pointed out that judges of a specialized court might be tempted to make policy from the bench and would have the potential to be captured by special interests. Congress ultimately overcame these objections when it created the U.S. Court of Appeals for the Federal Circuit in 1982.<sup>25</sup> The new court, while having subject-matter rather than geographical jurisdiction, was not designed to specialize in one narrow category of cases. It subsumed the appellate jurisdiction of the U.S. Court of Claims and the jurisdiction of the U.S. Court of Customs and Patent Appeals—each of which was abolished and had its judges transferred to the Federal Circuit—as well as jurisdiction over all patent appeals, appeals from civilian contract boards, and appeals from certain agency decisions.<sup>26</sup>

Debates over the three major policy initiatives designed to relieve the appellate courts of their growing caseloads and create more consistency in national law illustrated that changing the structure of the appellate system would have significant consequences—some intended and others not. Splitting a circuit could have an effect on substantive law and the protection of minority rights. Creating a national appellate

24. For further reading on the proposals for a national court of appeals, see James A. Gazell, “The National Court of Appeals Controversy: An Emerging Negative Consensus,” *Northern Illinois Law Review* 6, no. 1 (1986): 1–38; and Crowe, *supra* note 2.

25. Federal Courts Improvement Act of 1982, 96 Stat. 25 (1982).

26. For general discussions of specialized federal courts, see Posner, *supra* note 1, and Crowe, *supra* note 2. A brief summary of the history of the creation of the Federal Circuit can be found in Marion T. Bennett, ed., *The United States Court of Appeals for the Federal Circuit: A History, 1982–1990* (Bicentennial Committee of the Judicial Conference of the United States, 1991).

court could usurp the Supreme Court's role, at least in part, and make the Court even less accessible to the public. Establishing an appeals court with jurisdiction over certain areas of law could change the way those cases were handled and possibly their results. Judges, lawyers, lawmakers, and other interested parties realized that reforming the judicial system was never a simple matter of adding more capacity, but that every policy decision would have wide-ranging implications for the federal courts' ability to provide justice to the American people.

### *Civil Rights and the Division of the Fifth Circuit*

The most prolonged debate over how to address caseload pressures in the U.S. courts of appeals arose from proposals to redraw the geographical boundaries of the federal judicial circuits. While some observers called for a reconsideration of circuit boundaries as a whole, most of the debate centered on whether and how to divide the Fifth and Ninth Circuits, which were the nation's largest in terms of geography and population.

The notion of splitting a judicial circuit was not without precedent. In the 1920s, the Eighth Circuit was the nation's largest—encompassing thirteen states—as a result of the addition of new states to the Union between 1867 and 1912. With little debate, Congress established the Tenth Circuit in 1929, to consist of six former Eighth Circuit states (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming), while leaving seven states (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) in the Eighth.

By 1959, the Ninth Circuit was vast. It covered much of the western United States, including Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington, plus Alaska and Hawaii. Case filings in the Court of Appeals were growing rapidly, with 455 appeals filed in fiscal year 1960 and 719 in fiscal year 1963—a 58 percent increase in just three years.<sup>27</sup> The swift pace of caseload growth convinced some judges and lawmakers that the circuit should be split before the court needed so many judges that it could no longer operate efficiently. No proposal gained sufficient support, however, and the Ninth Circuit remained intact even as it grew from nine judges in 1954 to twenty-nine

27. *Judicial Business of the United States Courts, Annual Report of the Director of the Administrative Office of the U.S. Courts*, 1960 and 1963, Table B.

by 2009. One major stumbling block was the controversial question of whether California, the biggest source of caseload growth, should itself be split, with part assigned to a new circuit and part remaining in the Ninth. Efforts to split the circuit continued into the early twenty-first century, but none came close to fruition.

Perhaps the more complex case was presented by the Fifth Circuit, which by 1960 was the busiest appellate court in the federal judicial system. The court's docket increased by 41 percent between 1950 and 1960 and by another 50 percent over the next three years. In 1963, the Court of Appeals had 97 cases filed per judge, compared to a national average of 69.<sup>28</sup> The expansion of the court in 1961 from seven to nine judges failed to provide sufficient relief from the workload, and the judicial council of the circuit was already pressing for the addition of more judges in 1963. Many judges and lawmakers felt, however, that a substantial increase in size would necessitate splitting the circuit in two.

While growing caseloads were the reason some advocated a circuit split, the debate that ensued focused primarily on an issue of substantive law: civil rights. The Fifth Circuit had between the mid-1950s and late 1960s built a reputation as the federal court most protective of the rights of African Americans. In 1957, the court upheld a U.S. district court ruling invalidating Louisiana's attempt to maintain racially segregated schools by amending the state constitution in the wake of *Brown v. Board of Education*.<sup>29</sup> Other Fifth Circuit decisions in this period included *U.S. v. Wood*,<sup>30</sup> restraining local officials in Mississippi from prosecuting an African American man accused of breaching the peace while attempting to register to vote on the grounds that the prosecution was meant to deter other African Americans from registering, and *Meredith v. Fair*,<sup>31</sup> deciding in favor of James Meredith in his effort to desegregate the University of Mississippi.

The court's staunchest civil rights defenders were Richard T. Rives of Alabama, John M. Wisdom of Louisiana, John R. Brown of Texas,

28. Deborah J. Barrow and Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (New Haven: Yale University Press, 1988), 3–4.

29. *Orleans Parish School Board v. Bush*, 242 F.2d 156 (5th Cir. 1957).

30. 295 F.2d 772 (5th Cir. 1961).

31. 298 F.2d 696 (5th Cir. 1962).

and Elbert P. Tuttle of Georgia, all of whom were appointed to the bench during the 1950s. Civil rights advocates realized immediately that any plan to split the Fifth Circuit would mean separating Rives and Tuttle from Wisdom and Brown, severing the court's civil rights contingent and potentially weakening judicial protection of civil rights in the South.

On the other side of the civil rights issue was Senator James O. Eastland of Mississippi, chair of the Senate Committee on the Judiciary and a staunch segregationist. Eastland was firmly opposed to the notion of adding more judges to the Fifth Circuit without a split, but was equally insistent that any plan for a split place his home state of Mississippi with the states to the east—Alabama, Georgia, and Florida—which would result in a circuit more conservative than the one made up of the remaining states of Louisiana and Texas.

It was mainly concern over how a Fifth Circuit split would influence civil rights law throughout the South that dragged out the debate for nearly two decades before a final resolution could be achieved. In 1978, two crucial developments paved the way for the circuit split: Congress increased the number of authorized judgeships for the court from fifteen to twenty-six, leading many to believe the court was too large to remain unified, and Senator Eastland retired after having served in the Senate since 1941. Once the two circuit judges from Mississippi—James P. Coleman and Charles Clark—withdrew their opposition to a 3–3 circuit split, the court's active judges were unanimously in favor of such a plan.

To soothe the doubts of those still worried about a split's effect on civil rights, Chief Judge Coleman chose new Fifth Circuit appointee Frank Minis Johnson, Jr.—who had a strong civil rights record as a federal district judge in Alabama—to head the court's legislative liaison committee, which would advocate for the proposal before Congress. In 1980, President Jimmy Carter signed the act splitting the Fifth Circuit. Twelve of the circuit's authorized judgeships were transferred to the new Eleventh Circuit, consisting of Alabama, Georgia, and Florida, with the other fourteen judgeships remaining in the Fifth, now made up of Texas, Louisiana, and Mississippi (and until 1982, the Panama Canal Zone).

## Special Committee on the Geographic Organization of the Courts, Support for "Rule of Nine," March 16, 1964

In 1963, Chief Justice Earl Warren created the Special Committee on the Geographical Organization of the Courts, chaired by Chief Judge John Biggs of the U.S. Court of Appeals for the Third Circuit, to study the potential splitting of the Fifth and Ninth Circuits. Submitting its report at the Judicial Conference's March 1964 meeting, the committee concluded that the Ninth Circuit did not need more judges and thus did not need to be split. When it came to the Fifth Circuit, however, the Biggs Committee resolved that the region needed at least fifteen judgeships and that it should be split at the Mississippi River, forming a new circuit of Texas, Louisiana, and the Panama Canal Zone. The report offered strong support for the so-called Rule of Nine: that no court should have more than nine active judges, lest it experience decreased collegiality and efficiency of operation. The committee relied mainly on long-standing practice for its conclusion that having nine or fewer judges was ideal.

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[T]he courts of appeals, if conducted properly administratively, sit in panels many, many more times than they sit in banc. But, from time to time they are required to sit in banc and do so sit . . . and it is the consensus of the members of the Committee that the larger the number of judges the more difficult it is to arrange for in banc hearings, to hold them and to arrive at decisions promptly. . . .

Most of the courts of appeals have frequent meetings of all their members as circumstances may dictate and some of the circuit judges in some of the circuits are at considerable geographical distances from each other.

The Judicial Councils of the Circuits are required by statute . . . to meet at least twice in each year and many of the councils meet far more frequently. Every increase in the number of Judges makes the holding of council meetings more difficult.

The multiplication of judges requires a multiplication of paper work which mounts in total as caseloads rise. When action of importance is to be taken in respect to administrative matters it is customary in many of the circuits for the chief judge to consult with all judges in active commission of his court and not in-

frequently matters arise which have to be disposed of with some urgency. None of the members of the Committee feels impelled to take the position that nine is a magic number but with one exception as appears hereinafter all of the members of the Committee felt that the efficiency of any court of appeals would be impaired by an increase above that number. (There is a practical side to the problem which we think should be emphasized, that we know of no court of appeals of general jurisdiction in the United States which presently consists of more than nine members. It was the sense of the Committee that a large number of judges would detract from the efficiency of a court of appeals and that there were no courts in the United States of general appellate jurisdiction which exceed nine in their membership and this fact, to some degree, constitutes a practical test—a test by time and practice—as to what constitutes the most efficient number of judges for a court, any enlargement of which necessarily would impair efficiency.) . . .

It is the view of the majority of your Committee that circuit judges cannot be added indefinitely to the courts of appeals without presenting insoluble problems of administration and that a bold solution is the proper and only lasting one. Such a solution, in the opinion of your Committee, must be found in the creation of new circuits as necessity arises.

In view of the foregoing it is the judgment of the Committee that nine is the maximum number of active judgeships which may be allotted to a court of appeals without impairing efficiency of its operation and its unity as a judicial institution.

[Document Source: Judicial Conference of the United States, Committee Reports, March 1964, 24–28.]

Charles Alan Wright, Opposition to “Rule of Nine,” *Texas Law Review*, October 1964

A majority of the Judicial Council of the Fifth Circuit concurred with the recommendation of the Biggs Committee and voted in support of splitting the circuit so as to add more judges and still adhere to the Rule of Nine. At its March 1964 meeting, the Judicial Conference approved the Biggs Committee recommendations by a vote of 11–8. The Conference instructed Biggs to work with congressional staff to draft the necessary legislation.

Fifth Circuit judges Richard Rives and John Minor Wisdom resolved to fight the plan, however, fearing that breaking up the Fifth Circuit and aligning Mississippi with the states to the east would imperil the progress of civil rights jurisprudence in the Deep South. As part of their campaign against a circuit split, Judge Wisdom sent a five-page letter to his colleagues on the court (which he later sent to each member of the Judicial Conference, the justices of the Supreme Court, the district judges of the Fifth Circuit, and others). Wisdom's letter included a file of supporting materials, perhaps most notably an influential essay that the law professor Charles Alan Wright had written for the *Texas Law Review*. Wright objected to the Biggs Committee's support for the Rule of Nine, arguing that limiting the court to nine members would not guarantee its smooth operation, while expanding beyond nine members would not inevitably create administrative problems.

Judges Rives and Wisdom's campaign against splitting the Fifth Circuit was successful. The Judicial Conference adopted a resolution, proposed by Judge Griffin Bell as a compromise, that division of the circuit be tabled in favor of the addition of four new temporary judgeships, which were established by Congress in 1966 (and made permanent in 1968).

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It is easy to say what the optimum size of a court of appeals is. It is three. With only three judges, there can be no intra-circuit conflicts, no need for special rehearings en banc, and each judge will, presumably, be completely acquainted with every precedent handed down by the court during his period of service. Only the First Circuit today rejoices in these advantages, and the optimum simply cannot be achieved elsewhere. . . .

The moment a court of appeals is given more than three judges, problems arise. Intra-circuit conflicts develop. The result in a case may depend on the panel the litigants happen to draw. With each additional judge, these problems multiply. But what magic is there in the number nine which dictates that here the line must be drawn? When I was a law clerk in the Second Circuit, our court had only six judges. At that time the District of Columbia Circuit was the one court of appeals with nine judges. I well recall frequent comments by the judges and clerks in the Second Circuit, wondering how any court of appeals could function with so many as nine judges. It seemed perfectly clear to us that six was

the largest number of judges which would permit efficient operation of a court of appeals.

When we made those comments, we were illustrating in striking fashion de Tocqueville's admonition against confusing the familiar with the necessary. Today four circuits have nine judges. Although for a brief period the Supreme Court had ten justices, since 1865 no federal appellate court has had more than nine judges. And now the Special Committee opines that nine is the maximum number of judges which can be allotted to a court without impairing its efficiency and its unity. Is it possible that this is another illustration of de Tocqueville's warning? . . .

Since the courts of appeals will continue to sit in panels of three, no matter how many judgeships are authorized, it is hard to see any serious reason for limiting their membership to nine. The rare case in which rehearing en banc is held—in the Fifth Circuit at present these average about one a year—poses no insuperable difficulty. Courts can and do sit with more than nine judges elsewhere, and the courts of appeals could do so. If desirable, it is not unthinkable that there could be rehearing in exceptional cases before a panel of more than three but fewer than all the members of the court. . . . The one sound argument against a court of more than nine is that it will have more intra-circuit conflicts than does a court of nine. But how many intra-circuit conflicts are too many? A court of nine has more such conflicts than does a court of six, and many more than does a court of three, where such conflicts are nonexistent. Yet we tolerate nine-judge courts. Does the thought that intra-circuit conflicts in a court with more than nine judges would be intolerable reflect anything more than the normative power of the actual?

This is by no means to say that the larger the court the better. Clearly the fact is otherwise. But the problem is one of choosing among alternatives. If there are to be more judges in the overworked circuits, while retaining a limit of nine judges per court, the only alternative, as the Special Committee recognized, is to split existing courts and create more circuits. This is possible for the Fifth Circuit, and for the Ninth. It is doubtful whether it would be feasible for the Second Circuit, since the day is not far off when business arising out of the state of New York will alone amount to more than the 720 cases which a nine-judge court can, on my



premise, handle. How the District of Columbia Circuit can be split defies imagination.

The disadvantages of creating new circuits seem much more tangible and compelling than do the disadvantages of providing more than nine judges for a circuit.

[Document Source: Charles Alan Wright, "The Overloaded Fifth Circuit," *Texas Law Review* 42, no. 7 (October 1964): 970–973]

### Judge John C. Godbold, Necessity of Dividing Fifth Circuit, Testimony Before Hruska Commission, August 22, 1973

In October 1972, with caseloads in the courts of appeals continuing to rise, Congress created the Commission on the Revision of the Federal Court Appellate System, tasked with recommending changes to the geography of the circuits as well as "changes in the structure and internal procedures of the Federal courts of appeals system."

In hearings over the course of two years, the Hruska Commission (named after its chair, Republican Senator Roman L. Hruska of Nebraska) listened to testimony from judges, lawyers, academics, and members of Congress addressing fundamental assumptions about appellate justice in the federal courts. The commission's directive was broken down into two parts. One of its tasks was to consider the creation of a national court of appeals, but first the commission turned to the unresolved question of whether and how to redraw the geographical boundaries of the federal circuits.

The commission's hearings began in 1973 and quickly focused on the potential division of the Fifth Circuit. As was true in the 1960s, the judges of the circuit's court of appeals held conflicting views on the issue. Judge John Godbold appeared before the commission to urge that the Fifth Circuit be divided as soon as possible to facilitate the addition of more judges without sacrificing efficiency and collegiality. Godbold was oblique in addressing concerns about a split's effect on the circuit's civil rights record, contending that the diversity of a court is rooted in the individual philosophies of its judges, without regard to state lines.

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The matter that I particularly wish to emphasize in this prepared statement is the imperative necessity that there be a realignment now in the geographical size and the number of circuit

judges of the Fifth Circuit. There may—or may not—be changes in Federal jurisdiction and alterations in the Federal appellate structure. Realignment on a national basis may or may not prove feasible. But this circuit cannot wait if it is to maintain the quality of justice which our citizens are entitled to receive at our hands. . . .

This circuit is caught between the irresistible force and the immovable object, and the crunch grows more intense each year. On the one hand there is an ever-increasing volume of cases, and added to that assignments of additional jurisdiction to the Federal Courts by Congress. On the other hand there is the sure knowledge that an increase in the size of our 15-man court is not an answer. This is not abstract or theoretical. Through necessity we have been the laboratory for an experiment in how large a circuit court can become and retain its effectiveness. By work, ingenuity and the maximum of consideration for each other, we have stayed afloat but with the water lapping at the gunwales. Based on our experience our Judicial Council has reached an advised, carefully considered and unanimous conclusion that we are opposed to increasing the size of the court. . . .

A court that is too large loses the essential sense of collegiality. Like any other group, as it grows larger it tends to fragment into subgroups. We have not fragmented, in fact we have carefully avoided it, but there is no guarantee that our efforts will always be successful. As a court grows larger the proliferation of views and of shadings of views increases the number of concurring and special opinions, particularly in en banc cases. Also there seems to me to arise what one might call the silencing effect of a deliberative body's becoming too large. By this I mean the risk, particularly in en banc multi-issue cases, that the individual judge may conclude that there are so many viewpoints to be heard and considered on so many questions that he will not press and perhaps not even express his own views. Or if he presses them they may be lost or obscured in the shuffle. . . .

I share the view that the Courts of Appeal must avoid parochialism and must be diverse in the character of their membership. It seems to me, however, to be wrong to assume that achievement of these goals is inextricably bound up with the number of states in a circuit. The diversity of experience, viewpoint, and temperament on the Fifth Circuit is astonishing. Yet if one pauses to an-

alyze he will observe that this diversity is essentially unrelated to state lines. Federal judges always will have different attitudes on taxation, oil and gas, Federal agencies, community property, habeas corpus, automobile cases, and as many other fields of the law as one wishes to name. But the attitudes of judges have little relationship to their street addresses and zip code numbers. In the end performance of the federalizing function of the Courts of Appeals depends largely upon the hearts and the minds of the men who sit on the bench and upon the selection process which puts them there, and only secondarily upon the number of states from which each court draws its members.

[Document Source: *Hearings Before the Commission on Revision of the Federal Court Appellate System, First Phase*, August 22, 1973, 375–377.]

Judge John Minor Wisdom, Large Circuits Necessary for Courts of Appeals to Remain Diverse, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, September 24, 1974

The Hruska Commission report presented a number of different alignment options for the Fifth Circuit, with a clearly expressed preference for a 3–3 split with Texas, Louisiana, and Mississippi making up a new Eleventh Circuit. The Senate Subcommittee on Improvements in Judicial Machinery, yielding to the influence of Mississippi Senator James O. Eastland, instead considered bills to divide the circuit 4–2, with only Texas and Louisiana joined together.

Judge John Minor Wisdom continued to be the most forceful critic of the plan to split the Fifth Circuit. Testifying before the subcommittee in September 1974, he insisted that a proliferation of smaller circuits would threaten the “federalizing function” of the U.S. courts of appeals. Wisdom argued that circuits should embrace large geographic areas and be made up of judges from diverse backgrounds in order for the federal courts to overcome local prejudices and enforce federal law.

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This is a dangerous step toward proliferation of circuits that may not destroy but will certainly weaken the historic role of the federal courts in American Federalism.

A federal circuit court has a federalizing function as well as a purely appellate function of reviewing errors. Federal courts are more than courts which settle private disputes over contracts and torts. The federal courts' destined role is to bring local policy in line with the Constitution and national policy. Within the framework of "cases and controversies" and subject to all the appropriate judicial disciplines, federal courts adjust the body politic to stresses and strains produced by conflicts (1) between the nation and the states and (2) between the states and private citizens asserting federally created or federally protected rights. The United States Supreme Court cannot do it all. When the Supreme Court acts, inferior courts must carry out the Court's decision. It is up to us to put flesh on the bare bones of such broad mandates as the requirement that schools desegregate with "all deliberate speed." A court composed of judges chosen from six states is better insulated from parochial prides and prejudices than a court composed of judges from a small number of states. The Court of Appeals for the Fifth Circuit is truly a federal court. I question whether a court composed of judges from only Louisiana and Texas would be able to perform its federalizing function as well as the Fifth Circuit. . . .

As Madison clearly foresaw, the central principle that makes the American system workable is federal legal supremacy. This principle preserves national policy against conflicting local policy, protects the individual's constitutional rights against governmental abuses of both the nation and the states, and safeguards basic political principles of American federalism. As federal question litigation has increased, the circuit courts have become more and more important. Their relative insulation against local prides and prejudices, as compared with district judges and state courts closer to the fire, has enabled them to fulfill their destined, if friction-making, exacerbating role. In recent years the federal circuit system has proved workable in trying situations. I hope, indeed, I know, that this Committee will think long and hard and exhaust all reasonable alternatives before it takes a step that may lead to such proliferation of the circuits as to undermine the principle of federal legal supremacy.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2988, S. 2989, and S. 2990, The Realignment of the Fifth and Ninth Circuit Courts of Appeals*, 93rd Cong., 2nd sess., Part 1, 1974, 96, 98.]

Judge Thomas G. Gee, Lack of Necessity for Splitting Circuits, Testimony Before House Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, September 21, 1977

No bill to split the Fifth Circuit was passed in 1974 or 1975, and alternative proposals for administrative divisions within the circuit failed as well. The election of Jimmy Carter in 1976, however, put reorganization of the Fifth Circuit back in the spotlight. The Democratic majority in the House of Representatives—which had been reluctant to create new judgeships for Republican presidents to fill—was now prepared to consider legislation for expanding the ranks of the federal judiciary.

The Senate Judiciary Committee considered a new omnibus judgeship bill (S. 11) that once again included a 4–2 split of the Fifth Circuit. After the Judiciary Committee approved the bill, the entire Senate passed it by a voice vote in May 1977. The House Judiciary Committee's Subcommittee on Monopolies and Commercial Law, chaired by Democrat Peter Rodino of New Jersey, then launched new hearings on the question of dividing the Fifth Circuit.

A majority of the circuit judges continued to favor a split, as was reflected by a 10–3 vote among the active judges. The judges also voted 7–6 to oppose the addition of new judges to the court of appeals unaccompanied by a circuit split. In the minority was Judge Thomas Gee, who in testifying before the subcommittee called into question the merit of leaving the Ninth Circuit intact while splitting the Fifth, arguing that the two situations were almost identical. Gee also emphasized his belief that his court could function effectively with a larger compliment of judges, making a split unnecessary.

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In the meantime, what is to be done back at the circuit? Surely the same thing as S. 11 provides for the Ninth? Preserve the institutions that you know can do the job, add some judges to it, and watch to see if it can function. If it can't, then cut it apart as seems best. There is no principled distinction between the Ninth's situation and ours. We, too, have a state that produces as many appeals as some entire circuits—Texas. And we, too, have a backlog—though not so many per judge as they, and a pendency problem—though not as serious a one as they. In short, on the statistics we have the same problems as the Ninth. There is no reason on earth to permit the Ninth to stay together (as S. 11 does)

and experiment with increased judge power while dismembering the Fifth. We are both fully qualified to be an ideal laboratory for these experiments. And if neither of us succeeds in functioning with increased judge power, then both can be easily divided and the judges will already be there to garrison each part.

I, for one, do not agree with my colleagues who will shortly speak for the split, who have gone on record that they want no more judges unless the circuit is split. I do not wish to be in the position of telling the Congress that I am unwilling to try further innovations which it sees fit to authorize—such as, for example, a court of 26 judges. It may work fine; why give up without even trying? Don't Congressional committees that large work all right? . . .

We are often told that such a larger court would be big and unmanageable. But, of course, the total number of judges would have no effect at all on our normal operations, for we sit in panels of three anyhow for these. In fact, the only effect of a larger total court is on en banc and Judicial Council actions, and on the volume of reading we must do to keep up with our own law. For 1977, our opinion output should come to about 8000 pages, since for the first eight months it was 5300 pages written by our own judges. This means that to stay current, each of us must read and digest matter during a year approximately equivalent in volume and difficulty to reading the "Old Testament" or De Toqueville's "Democracy in America" ten times. A serious task, but scarcely a crushing one. As for en bancs, I cannot believe that with orderly procedures and an appropriate amount of time provided, 20 or 25 federal circuit judges cannot state their views and vote. If not, something is wrong either with the judges or with the procedures, for I am told that committees of the Congress perform this supposedly impossible feat routinely. But if for some reason this should prove impossible, certainly an en banc composed of some number of active judges less than the whole court, randomly drawn or selected in some manner by seniority, could perform the en banc function for the court.

[Document Source: U.S. House of Representatives, Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, *Hearings on A Proposal to Divide the Fifth Circuit (U.S. Court of Appeals)*, 95th Cong., 1st sess., 1977, 37.]

Attorney General Griffin B. Bell, Support for Permitting Mississippi to Remain with Eastern States, Testimony Before House Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, September 27, 1977

The proposal to split the Fifth Circuit was contentious, but it was clear to most of the judges and lawmakers involved that the primary obstacle to division was the insistence of Senate Judiciary Committee chair James O. Eastland that Mississippi not be severed from Alabama, Georgia, and Florida. Eastland, who resented the role of the federal courts in supporting the civil rights movement, hoped to isolate the circuit's liberal judges, from Louisiana and Texas, by placing them in their own circuit.

Attorney General Griffin Bell, a former Fifth Circuit judge, attempted in his testimony before the House subcommittee to downplay the issue of Mississippi's circuit assignment. Bell argued that Congress should acquiesce if the representatives of the state wanted to remain in the circuit with the states to the east and posited that it would not be difficult to move states between circuits in the future should circumstances warrant reorganization.

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And I want to get down to what is really the issue here, Mr. Chairman, and I don't think anyone has addressed the issue up until this time. That is Mississippi; where are we going to put Mississippi? . . .

Should Mississippi be part of the 5th circuit or the 11th circuit? In terms of caseloads, it makes little difference. Mississippi contributes only a small portion of the caseload in any event, ranging from 4 percent to 5.7 percent over the past 5 years.

An essential point in my view is that the people of Mississippi desire to be a part of the new fifth as proposed in the pending bill. This is reflected through their Representatives in the Congress.

I would agree to this. It will make little, if any difference from a philosophical or civil rights vindication standpoint. The fifth circuit today is generally considered to be one of if not the most liberal of the circuit courts. And most of the 15 judges on the court come from Florida, Georgia, Alabama, and Mississippi. In fact, if I can count right, 9 out of 15 come from those four States. This

demonstrates the dedication of these judges to the Constitution and the law. Otherwise, the record of the court would be different.

Moving one State from one circuit to another is a matter that rests entirely with the Congress. Thus, there is little risk, if any, of irreparable harm simply from the placing of Mississippi in one circuit rather than the other, the point being that you can move the State if something goes wrong. You can move Georgia to the fourth circuit. It used to be in the fourth circuit. Just moving one State around is no problem, so if something does go wrong, the State can be moved later.

In the end, it is not States but judges to whom we must look to safeguard constitutional rights. You may be sure that the President, and I as Attorney General, will be diligent in our approach to judicial appointments to vouchsafe the rights of every American, wherever located.

[Document Source: U.S. House of Representatives, Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, *Hearings on A Proposal to Divide the Fifth Circuit (U.S. Court of Appeals)*, 95th Cong., 1st sess., 1977, 78.]

U. W. Clemon, Importance for Civil Rights of Leaving Fifth Circuit Intact, Testimony Before House Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, Oct 19, 1977

The issue of civil rights and the federal courts remained important to the debate about the Fifth Circuit in 1977. U. W. Clemon, president of the Alabama Black Lawyers Association, explained to the House subcommittee why his organization deemed it crucial that the Fifth Circuit not be divided. African Americans in the Deep South could not depend on state governments or the U.S. district courts, he asserted, to protect their civil rights. Splitting apart the coalition of judges most supportive of such rights on the Fifth Circuit would, in his opinion, be disastrous. In 1980, President Jimmy Carter appointed Clemon to the U.S. District Court for the Northern District of Alabama.

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It is for me an honor to have been permitted to speak to your subcommittee briefly on an issue which is, in my judgment, as momentous as those the Congress faced twelve and thirteen years



ago in the enactment of the 1964 and 1965 Civil Rights Laws. The proposed split of the Fifth Circuit Court of Appeals, as embodied in S. 11, would represent a signal victory for those who most bitterly opposed that legislation. Likewise, the victors would be those who, in the years subsequent to their enactment, have most consistently criticized the Fifth Circuit for its fair and reasonable interpretation of the letter and spirit of the Civil Rights Laws and the Fourteenth Amendment. . . .

It is not an overstatement to say that the Fifth Circuit, as presently constituted, serves as the proverbial “balm in Gilead” on civil rights and civil liberties issues. Blacks whose constitutional and statutory rights have been denied, frustrated or ignored by public and private actions and institutions in the Deep South can look only to the Fifth Circuit for relief.

We cannot turn to the three branches of State government—for it is largely the executive and legislative branches of State government which, in many instances, create and exacerbate the problems. The State courts are singularly unable to provide relief—as these judges are also elected by and ultimately accountable to the same constituencies as the executive and legislative officers.

Thus, as a practical matter, we . . . blacks in the Deep South must look to the federal government for the vindication of our federal constitutional rights and such statutory rights as Congress sees fit to create. At the district court level, most of the federal judges tend to construe civil rights legislation as though it were penal in nature. When called upon to interpret the meaning of such legislation in a given factual setting, their judicial philosophies—strongly influenced by the local social pressures to which they are subject—produce results which generally frustrate the national policy of ending racial discrimination in housing, employment, education, voting, and public accommodations. Because of the prevailing customs and mores of the local communities in which the federal judges live, and the inevitable impact of such pressures on them, the Fifth Circuit Court of Appeals has become the only federal court (save two or three district courts) in which blacks can justifiably place their trust. That trust has been upheld over the years in hundreds of cases affecting virtually all aspects of the lives of black people in the Deep South.

The [F]ifth Circuit has earned its coveted reputation as the country's most sensitive circuit on issues of civil rights not because a majority of its judges have come from Texas and Louisiana. Rather, the circuit achieved that status because its judges were from Texas and Louisiana and Mississippi and Alabama and Georgia and Florida. From each of its constituent states, the circuit is fortified by judges with diverse philosophies or points of view. And it is precisely these differences—shaped by the diverse experiences, customs, traditions, and outlooks of men from six widely diverse states—that have produced the Fifth Circuit as we know, love, respect, and revere it today.

We of the Alabama Black Lawyers Association are convinced to a moral certainty that a split of the time-tested and proven Fifth Circuit, in the manner proposed by S. 11, would have an immeasurable adverse impact on the future of civil rights in the Deep South.

[Document Source: U.S. House of Representatives, Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, *Hearings on A Proposal to Divide the Fifth Circuit (U.S. Court of Appeals)*, 95th Cong., 1st sess., 1977, 99.]

Althea T. L. Simmons, Prematurity of Fifth Circuit Split, Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, August 22, 1980

While a bill splitting the Fifth Circuit had passed in the Senate, the bill ultimately agreed upon by the House and the Senate did not provide for a split. Instead, the bill permitted the creation of administrative divisions within the circuit while expanding the Court of Appeals from fifteen to twenty-six authorized judgeships. Nine new judges took their seats between March and July 1979, bringing the number of active judges to twenty-four. The court heard twelve cases en banc that year, and the size of the court made the process unwieldy, complicated, and time-consuming. This fact, combined with the 1978 retirement of Senator Eastland, which allowed for the introduction of a bill placing Mississippi with Texas and Louisiana, finally paved the way for a Fifth Circuit split.

While the opposition of some civil rights groups to a split softened in 1980, chiefly because of the resolution of the Mississippi issue, the NAACP continued to oppose the split. Althea Simmons, the director of the NAACP's Washington bureau, noted that her or-

ganization's hesitation stemmed from uncertainty about the large number of new judges in the Fifth Circuit. Simmons counseled for patience in making any change to the circuit that embraced the Deep South, lest the reorganization have unintended consequences for civil rights law.

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The NAACP is not unmindful of, nor insensitive to, the problems addressed in the current petition . . . regarding the increased size of the court and the projected increase in workload. Our continued concern is occasioned because we believe that no one can tell, at this juncture, the impact of the enlarged judiciary and a period of time is necessary to allow the system and opportunity to "settle in its own tracks" after the addition of new judges at the district and appellate levels.

If, at some reasonable time, after observing the impact of the present additions to the circuit, it appears that additional flexibility is needed, a first avenue of change might reasonably be expansion of the administrative structure e.g., the use of administrative law judges. Such an approach would provide much-needed time to consider whether a more permanent change is needed and, more importantly, any changes could then be effected with some experience based on the increase in workload. . . .

Mr. Chairman, the NAACP believes that any changes in the judiciary should not be undertaken in piecemeal fashion or, for that matter, out of political consideration; therefore it occurs to us that the Congress may wish to view the impact of changes already made before grafting on new ones and may well consider exploring whether or not there should be additional kinds of adjustments in the means by which we settle disputes or comprehensive changes within the several circuits. . . .

An equally important argument against the proposed division is that such a split of the circuit would substitute two completely new entities with unknown performance toward major constitutional issues for the present high quality court with a known and impressive track record. For the past two decades, a majority of civil rights cases have been heard before the Fifth Circuit, and blacks and other minorities, disenchanted at the local and/or district level, have looked to the Fifth Circuit for justice. The Fifth

Circuit has been a citadel in the civil rights arena. Its forthright approach to the issues has gained the respect of blacks and other minorities and most of its decisions in the civil rights area have been upheld by the U.S. Supreme Court.

Blacks are becoming increasingly sensitive to the importance of the composition of the courts as many blacks harbor deep reservations regarding the administration of justice. This has been unfortunately highlighted by the recent civil disorders in a number of cities over the past several months.

Additionally, the present status of those black judicial nominees now before the Congress, coupled with a failure to receive a “fair share” of judicial nominations, is seen by a number of blacks as a concerted effort to retreat from any forward thrust in civil rights. The NAACP is not only concerned with the possibility of the reality of insensitive courts in the South, it also fears that a change in the circuit will be perceived by blacks as an attempt to erode civil rights gains. Any action, at this time, may well lend credence to such perception. . . .

Mr. Chairman, the uncertainties of such a proposed move could have a devastating effect on the ability of civil rights litigants and their counsel to rely on precedents established by the present court. . . .

[I]n summary, the NAACP believes that a split in the Fifth Circuit is premature at this time and that a more feasible approach would be to observe the functioning of the enlarged court to ascertain whether a change is necessary, and if so, what kind, for the efficient and fair administration of justice.

[Document Source: U.S. House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, *Hearings on H.R. 6060, H.R. 7665, and Related Bills, Federal Court Organization and Fifth Circuit Division*, 96th Cong., 2nd sess., August 22, 1980, 13–14.]

Judge Robert A. Ainsworth, Jr., Appellate Courts Should Be Trusted to Uphold Civil Rights, Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, August 22, 1980

Fifth Circuit judge Robert Ainsworth responded to the NAACP's concerns about the potential effect of a circuit split on civil rights law. In testimony before the House, Ainsworth asked that civil rights groups give the two southern courts of appeals the benefit of the doubt and trust that they would continue to uphold the civil rights gains the previous generation had won.

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We feel that the resolution of the [NAACP] opposing division of the circuit is misguided and based on misapprehension. So we would say to those who regard our court so highly that they should reciprocate by trusting us.

Good relationships are built on trust. We urge that you trust our judgment that the quality of justice is now diminished in the present large court, that it is extremely difficult to carry on under present conditions, and that the people in the best position to know this are the judges of the court themselves.

Our judgment should be trusted that the judicial philosophy of the two courts after division will not differ from what it is today and that there will be no loss of sensitivity to constitutional rights. We think we have merited the trust of those who do business with the court and that trust can best be exemplified by supporting the existing legislation.

[Document Source: U.S. House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, *Hearings on H.R. 6060, H.R. 7665, and Related Bills, Federal Court Organization and Fifth Circuit Division*, 96th Cong., 2nd sess., August 22, 1980, 57.]

## *National Court of Appeals*

Like other federal courts, the Supreme Court of the United States experienced an increase in workload that led policymakers to search for legislative solutions during the 1960s. The growth in habeas corpus

and other civil rights petitions, criminal appeals, and petitions for review of federal laws and regulatory actions filtered up through the lower federal courts and threatened to overload the nine justices. In 1950, the Supreme Court had 1,335 cases on its docket. In 1960, that number had grown to 2,313, and ten years later, to 4,212. One source of docket congestion was an increase in petitions for certiorari filed in forma pauperis, or by those who could not afford filing fees, the number of which more than quadrupled between 1950 and 1970.<sup>32</sup>

The capacity of the Supreme Court to handle its growing caseload became a major source of debate in the late 1960s, as it had several times in the past. One consequence of the Court's acceptance of a smaller proportion of cases submitted to it was that many circuit splits went unresolved. At the same time, the portion of the Court's docket occupied by nonconstitutional cases was falling rapidly. These trends gave rise to widespread concerns about the Court's ability to process cases efficiently, to remain accessible to litigants, and to provide uniformity in the interpretation of federal law and the Constitution.

A number of commissions and study groups charged with examining the appellate system proposed creating a new tribunal, a national court of appeals, which would be empowered to handle important matters not reaching the Supreme Court. The idea of a national appellate court below the Supreme Court was not entirely new. The concept was one of several competing proposals during the debates on reshaping the judiciary in the 1870s and 1880s that culminated with the creation of the nine regional U.S. courts of appeals in 1891.

Ideas about how a national court of appeals would work varied, with the discussion centering on assigning it various combinations of three primary functions. Initial proposals would have had the new court review petitions for certiorari and make nonbinding recom-

32. Historical caseload data for the Supreme Court of the United States is available on the Federal Judicial Center website at <https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-1823-1846> and <https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-1878-2015>. Data on petitions for certiorari is also available at <https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-petitions-certiorari-1923-1969> and <https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-petitions-certiorari-1970-2015>. Data for the period in question was taken from the *Annual Report of the Director of the Administrative Office of the U.S. Courts* and the *Journal of the Supreme Court of the United States* for each respective year.

mendations to the justices about which cases they should hear. Later ideas involved “transfer jurisdiction,” whereby a U.S. court of appeals would be empowered to transfer a case to the National Court of Appeals when the case involved a legal issue on which the circuits were divided, and “reference jurisdiction,” which would have allowed the Supreme Court to refer to the National Court of Appeals a case for which it had denied review.

One prominent concern about the proposal was that assigning the review of certiorari petitions to a new appellate court would exacerbate the problem of the Supreme Court’s inaccessibility. The creation of the courts of appeals—which became the final arbiter of most cases in the federal court system—led many to object that public access to the nation’s highest court was being sacrificed in the name of efficiency. This worry intensified in 1925, when the Judges’ Bill cut down significantly the number of cases that could be appealed to the Supreme Court as of right, and expanded the number that would be heard only if the justices elected to grant a writ of certiorari. In light of this history, some critics saw the proposed National Court of Appeals primarily as an impediment to litigants’ access to the Supreme Court.

Opponents of a national court of appeals also feared that its judges—particularly if they rotated, as some proposed—would not be qualified to review petitions for certiorari, because they would lack the “feel” for the process that the justices had developed over time. Moreover, critics felt that taking away some of the Supreme Court’s control over its own caseload would weaken the legitimacy of the institution in the eyes of the public. Proponents of the new court argued that if review of petitions for certiorari remained solely the province of the Supreme Court, law clerks or other Court staff, rather than the overburdened justices, would be left to perform the task.

The proposals to allow the new court to decide cases on the merits—whether transferred from a U.S. court of appeals or referred by the Supreme Court—raised concerns as well. Some felt that creating a new appellate court with decisional authority was necessary for the harmonization of federal law. Others believed that such a plan infringed on the Supreme Court’s status as the highest court of the land, perhaps in violation of the Constitution, and would damage the Court’s legitimacy. One prominent criticism was that permitting the Supreme Court to refer cases to a national court of appeals would result in the Supreme Court hearing only cases involving constitutional

questions, having no engagement with the growing body of federal statutory law and becoming less accessible to the public than ever.

Earl Warren, Opposition to Divesting Supreme Court Justices of Responsibility for Certiorari Review, Bar Association of City of New York, Speech of May 1, 1973

In 1972, Chief Justice Warren E. Burger appointed the Study Group on the Caseload of the Supreme Court, which carried out its work under the auspices of the Federal Judicial Center and was chaired by Professor Paul E. Freund of Harvard Law School. The Freund Group, which consisted only of lawyers and law professors, issued its report in December 1972.

The most important recommendation of the Freund Group was for the creation of a national court of appeals, staffed by a rotation of circuit judges, to screen all cases in which parties sought review by the Supreme Court. A denial of review in the new appeals court would be final, while the new court would also have discretion to certify cases for disposition by the Supreme Court, presumably a few hundred per term. The Supreme Court would have full discretion to grant or deny review of cases certified to it by the new appeals court. The new court would also be empowered to decide on the merits those cases that would resolve a conflict between circuits.

Former Chief Justice Earl Warren, who had remained out of the public eye since his departure from the Supreme Court in 1969, was among the most critical of the Freund Group's proposal. Warren argued that to divest the justices of their screening responsibilities would imperil the constitutional mission of the Supreme Court. He saw review of certiorari petitions as necessary for the Court to keep abreast of new legal developments in the country and to adapt the "living constitution" to evolving social circumstances. To divorce justices from the review of certiorari petitions, he argued, threatened to strike at the public legitimacy of the Supreme Court.

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The proposal that a new National Court of Appeals take over most of the certiorari screening task is fraught with practical, jurisdictional and constitutional problems of the first magnitude. Inevitably the capacity of the Supreme Court to maintain the Constitution as a living document and to develop a single national jurisprudence would be jeopardized. And the Court would lose its symbolic but vitally important status as the ultimate tribunal to which all citizens, poor or rich, may submit their claims. . . .



While somewhat divisible on the surface, the initial screening aspect of the Supreme Court's certiorari jurisdiction is necessarily integrated with the totality of that jurisdiction. The Court's certiorari jurisdiction, and particularly the part thereof that permits the Court to select and reject the issues submitted to it for decision, was designed by Congress for a very special purpose. That purpose is to permit the Court not only to achieve control of its docket but to establish our national priorities in constitutional and legal matters.

The establishment of those priorities is a function that Congress, the bar and the public expect the Supreme Court to perform. It is a function that involves the selection of those few issues of truly national significance that four or more Justices deem appropriate for resolution by the Court. But the function also involves the denial of review of issues that the Justices for any number of reasons may deem inappropriate for present consideration. Such denials can and do have a significant impact on the ordering of constitutional and legal priorities. Many potential and important developments in the law have been frustrated, at least temporarily, by a denial of certiorari.

This ordering of priorities simply cannot and should not be delegated to a subordinate tribunal. The standards by which the Justices decide to grant or deny review are highly personalized and necessarily discretionary. Those standards cannot be captured in any rule or guideline that would be meaningful to an outside group of judges. . . .

Yet we are asked by the Study Group to accept the proposition that the endless and changing panels of lower court judges, as they shuffle in and then out of the National Court of Appeals, could suddenly and temporarily acquire the essential characteristics and experiences of a Supreme Court Justice. . . .

In a long sense, the Supreme Court must have before it for decision the entire docket of certiorari petitions. The very flow of those cases through the chambers of the Court serves to inform the Justices of what is happening in the system of justice. As such, the certiorari workload serves as an instrument for the ultimate supervisory function which the Supreme Court exercises in the administration of constitutional and legal justice. . . . And there is no reason to believe that the changing panels of the National Court of Appeals could effectively fill this gap. . . .

I must close with a reaffirmation of my abiding faith in the ability of the Supreme Court to take whatever internal steps are necessary to maintain a firm control of its docket and to see that equal and speedy justice is accorded to all who come before it. Its doors must remain open to all people and to all claims of injustice. The public faith in the Court, and the esteem in which it is held, rest in large part upon the knowledge that the Court is always there to right the major wrongs that do occur within our legal system and to advance and protect our precious constitutional liberties and privileges. And part of that public faith and esteem depends upon the certainty that, when all other judicial remedies have been exhausted, the Supreme Court will at least consider and listen to the citizen's final plea.

But if the doors of the Court were to be shut to fully 90 percent of the citizens' complaints, and if the complainants were forced to accept the final judgment of a chance group of unknown and temporary subordinate judges, its public stature as the "palladium of justice" and the "citadel of justice" would soon begin to fade.

[Document Source: Earl Warren, "The Proposed New 'National Court of Appeals,'" *The Record of the Association of the Bar of the City of New York* 28, no. 7 (October 1973): 637–638, 640–641, 645.]

### Chief Justice Warren Burger, Heavy Burden on Justices of Reviewing Petitions for Certiorari, *American Bar Association Journal*, July 1973

Chief Justice Warren Burger had established the Freund Group, and he responded as current and former justices criticized its approach and conclusions. Burger emphasized the energy and time required of the justices to process petitions for certiorari. He argued that it was unrealistic to expect the nine current justices, confronted with three times the labor of the previous generation, to produce work of the same quality. Burger defended the methods of the Freund Group and challenged critics to offer alternatives to helping the Court meet the demands of its workload.

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There is a need for a searching debate on the proposals of the study group. Of course, they should be scrutinized, debated, and

discussed. That is how the circuit courts came into being more than eighty years ago and how the certiorari bill was enacted nearly fifty years ago.

One comment in the limited debate that has taken place thus far suggests the need for a searching analysis of the sweeping generalizations made by way of objection. For example, one critic brushed aside the time needed to deal with petitions for certiorari with the statement that most petitions needed only five or six seconds to pass on. I am willing to assume the gentleman misspoke himself and that possibly he meant five or six minutes, but I would still reject his notion of how the Supreme Court should evaluate a petition. Some are indeed patently frivolous, but that is an evaluation calling for more than five or six seconds. We are all aware that back of a petition for certiorari may be several years of litigation in the trial courts, a large record on an appeal in which competent lawyers have spent hundreds of hours, followed in turn by a great deal of time on the petition for certiorari. I doubt that the bar of the Supreme Court—or the bar generally—would think that five or six seconds, or indeed five or six minutes, constitute the true judicial consideration contemplated by our system of justice.

In a sense the half dozen people who have written or spoken critically on the committee report pay members of the Court a great compliment and one that speaking only for myself—I must reject. The compliment is inherent in the suggestion that the nine men on the Court today can deal with forty-five hundred docketed cases as adequately as Cardozo, Roberts, Stone, Butler, Sutherland, Brandeis, McReynolds, Van Devanter, and Hughes did in 1935 with 1,092 cases, or as well as Rutledge, Jackson, Murphy, Douglas, Frankfurter, Reed, Black, Roberts, and Stone did in 1943 when there were 1,118 docketed cases.

It would be comforting, should I come to have grandchildren, for them to read that grandfather and his eight colleagues disposed of three, four, or five times as many cases as the justices of 1935 or 1943, and did it with consistently high quality. But to be entirely candid, I do not regard myself as an advocate who could carry that burden of proof.

The study group's analysis of the problem is beyond challenge, and if one of their recommendations is challenged, let us

hear the alternatives that others propose. I, for one, will defer my own conclusions until all the arguments are in and all alternatives have been explored.

[Document Source: Warren Burger, "Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal," *American Bar Association Journal* 59, no. 7 (July 1973): 724.]

Alexander M. Bickel, Necessity for Screening Petitions for Certiorari Outside of the Supreme Court, Pamphlet of November 1973

Noted constitutional scholar and Freund Group member Alexander M. Bickel responded to the strong criticism of the group's recommendations with his own pamphlet in November 1973. He rebutted assertions, such as those made by Justice William O. Douglas, that reviewing petitions for certiorari did not overburden the Supreme Court. Bickel explained why the group had concluded that screening of certiorari petitions was best done outside of the Court. If the Supreme Court continued to screen the petitions, Bickel argued, it would eventually have to rely on law clerks or a central screening staff. Such an arrangement would transform the Court into a bureaucracy, separate the justices from their responsibilities, and harm the reputation of the Court. Bickel further argued that access to the Court would be an illusion if petitions were screened by staff rather than the justices themselves. It would be preferable, he asserted, to create a new institution for this purpose, public confidence in which would likely grow over time.

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Other ways of relieving the justices by institutionalizing the screening function within the Court all necessarily involve creating an explicit gap between function and responsibility. The formal responsibility would remain with the justices, but the function would be delegated effectively to an augmented staff of junior law clerks or to senior law clerks . . . or to some other form of senior professional staff. . . .

This would constitute, not to put too fine a point on it, bureaucratization of at least one aspect of the process of justice, and the objection to it is fundamental. . . .

In the absence of any other remedy, the Court will necessarily edge in this direction. The trend may have already started, with some pooling of law clerks and possibly with the prospective employment of three senior law clerks. Justice Brandeis no doubt overstated the disrepute . . . that has been the fate of legislative and executive agencies where men do not do their own work. But he did not overstate the consequences that would follow upon the conversion of the Supreme Court, in whatever degree, into another administrative agency. Americans not only respect the justices because they do their own work, they also expect them to do their own work. The people understand that judging is an individual, not an institutional, function. Separation of function from responsibility by internal delegation to staff would constitute a scandal that would sap the Court's authority as soon as people realized what had happened.

What then of the costs, which critics of the study group's recommendation deem unacceptable, of institutionalizing control of the Court's docket externally, visibly, in a body that is responsive to the Court itself but appointed independently of it and accountable publicly after the fashion of other courts? . . .

The theme, common to so many of the critics of the study group's report, that the benefits in time saved would be minimal is inconsistent with another equally common theme of the critics, that the loss of control over its own docket would grievously impair the Court's function. It is not easy to understand how a task which takes so little time, which demands only a few seconds' attention to trivial and frivolous cases, a task that judges invited to serve on the new National Court would scorn because its performance would turn them into "Glorified Law Clerks," can also be a task so critical to the proper performance of the Court's function that to take any part of it away would be to emasculate the institution. If the flow of petitions for review to the justices' chambers informs the justices of what is happening in the system of justice, and if it is essential that they keep themselves thus informed, it cannot be that they do it by a second's glance at a petition, and it cannot be that the time and energy expended are minimal and not worth saving. . . .

To the related objection that the study group's recommendation would involve not only a loss of control on the part of the

Court but a loss of access to it on the part of litigants, the answer is that very little if anything in the way of meaningful access would be lost and that, in any event, there is no *a priori* right of access to the Supreme Court. . . . If nothing is done, or if staff is resorted to, the vaunted right of access to the Supreme Court will be an illusion. It will be access, indeed, to the most cursory and superficial consideration of petitions, or else access not to judges but to an invisible staff. That is all the loss of access that adoption of the study group's recommendation would impose. . . .

It is the birthright of Americans, say former Justice Goldberg and some other critics of the National Court proposal, to have access to the Supreme Court as a palladium of liberty and a citadel of justice. Yes, in the words with which Hemingway's *The Sun Also Rises* ends, yes, "isn't it pretty to think so?" And some people persist in thinking so, as others have before them. But it is not true. It cannot be true in a nation of over 200 million people served by one Supreme Court.

[Document Source: Alexander M. Bickel, *The Caseload of the Supreme Court and What, If Anything, To Do About It* (Washington, D.C.: American Enterprise Institute for Policy Research, 1973), 29–32, 34.]

### Judge Shirley M. Hufstedler, Importance of Harmonizing National Law, *American Bar Association Journal*, May 1974

While the initial proposal for a national court of appeals was unpopular, other groups proposed revised versions of the plan in 1974. The American Bar Association's Special Committee on Coordination of Judicial Improvements and the Advisory Council on Appellate Justice both endorsed a plan for the creation of a "national division" of the U.S. courts of appeals. The plan provided that Congress would specify certain types of cases, such as tax appeals, patent cases, and appeals from decisions of certain federal agencies to be reviewed by the national division first and that the Supreme Court would be authorized to refer other cases to the new court. To ease the burden of habeas corpus petitions on the district and circuit courts, the new national division would have jurisdiction over habeas petitions arising from state court criminal convictions.

Judge Shirley Hufstedler of the U.S. Court of Appeals for the Ninth Circuit served on both the American Bar Association (ABA) special committee and the advisory council. Hufstedler argued that

the ability of the appellate system to harmonize federal law was its most important function and was in danger, making a new national appeals court necessary.

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Judges' responses to excessive pressures are not dissimilar to those of other mortals. They get tired, discouraged, and the work product suffers. The institutional responses, however, are more troubling. We see signs of breakdown because the appellate courts are not able adequately to perform their institutional roles of authoritatively interpreting federal statutes, of formulating and expressing policy on legal issues of system-wide concern, and of supervising each level of the system below them. . . .

Another symptom of systemic distress is the increasing evidence of intra- and intercircuit jurisprudential conflict and disharmony. The Supreme Court is the sole judicial institution empowered to pronounce law binding the entire federal judiciary and, therefore, the only agency capable of eradicating intercircuit conflicts. . . .

The Supreme Court does not have the decisional capacity to keep the national jurisprudential house in order. It can give plenary consideration to not more than two hundred cases per year, and usually the figure is closer to one hundred fifty annually. . . . Substantial clues to the pervasiveness of the problem can be gathered from reporting services for legal specialties and quasi specialties, such as taxation, antitrust, securities regulation, selective service law, and administrative law. The services regularly call practitioners' attention to the new developments, conflicts, and aberrations in their respective fields. Only a small fraction of the reported wrinkles are ironed out by the Supreme Court, despite invitations to do so. Of course, some of the issues are of insufficient moment to deserve a national answer, but the residue cannot be dismissed so lightly. . . .

Not only are one hundred fifty cases too few to permit effective supervision of lower federal courts, they are too few to supply national answers to issues that have become pressing long before circuit disagreements have arisen. The lack of reasonably prompt definitive answers to issues of national concern can thwart rational

public and private planning, whether the subject is the location or design of a new dam or a factory, the licensing of a communications facility, the budgeting of funds to meet demands for social services, or managing the securities markets. The lack of certitude excessively breeds litigation, particularly when the litigants have both the motivation and the power to renew lost battles in forum after forum.

What can be done to help the Supreme Court and the circuits to harmonize national law and to resolve legal issues of national concern promptly? . . .

Circuit splitting, a response sometimes suggested, is at best a placebo, not a remedy. Aside from the danger that circuit division generates new dilemmas for which it offers no solutions, it has the defect that it can lull Congress into believing that it has accomplished something and thus postpone action that could supply real relief.

An essential ingredient of any formula for relief of the federal appellate system is the creation of a new national intercircuit court of appeals, flexible in both function and design, to serve the purposes of relieving the courts of appeals, of harmonizing federal law, of promptly resolving legal issues of national concern that cannot be reached by the Supreme Court, given its decisional limitations, and of providing a spillway for Supreme Court overflows.

[Document Source: Shirley M. Hufstедler, "Courtship and Other Legal Arts," *American Bar Association Journal* 60, no. 5 (May 1974): 546–547.]

### Robert J. Kutak, Support for Transfer Jurisdiction, Testimony Before Hruska Commission, April 15, 1975

In April 1975, the Commission on the Revision of the Federal Court Appellate System (better known as the Hruska Commission), which had previously examined the possibility of changing circuit boundaries, circulated a draft of its final report outlining its own proposal for a national court of appeals. The Hruska proposal envisioned two types of cases to be heard by the National Court of Appeals: cases referred to it by the Supreme Court and cases transferred to it by one of the U.S. courts of appeals. When faced with a petition for certiorari, the Supreme Court would have the option of granting review, denying review and ending the litigation, or denying review in the Supreme Court but referring it to the National Court of Appeals for



decision on the merits. The Supreme Court could also deny review and refer a case to the new court while also granting it discretion to review the case or deny review. Supporters envisioned that this so-called reference jurisdiction would be made up chiefly of cases appealed from state courts. Transfer jurisdiction, on the other hand, was designed to create an alternative tribunal to resolve national issues on which the circuits had previously reached inconsistent decisions. The Hruska proposal also differed from the Freund Group's, calling for seven judges to be appointed permanently to the court by the president with confirmation by the Senate, rather than for existing circuit judges to be appointed for limited terms as the Freund Group had advocated.

In hearings on the draft report, Robert J. Kutak, who was chair of the ABA Special Committee on Coordination of Judicial Improvements, spoke in favor of part of the Hruska plan. For Kutak, the main problem facing the appellate system—intercircuit conflicts in nonconstitutional cases—was solved by the Hruska plan's transfer jurisdiction. The reference jurisdiction portion of the plan, under which the Supreme Court would refer certain cases to the National Court of Appeals, Kutak believed to be unnecessary, particularly in light of criticism that it would further restrict litigants' access to the Supreme Court.

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The experience of the past few years shows that not all lawyers believe that a national court other than the Supreme Court is needed. Yet a growing number of lawyers who have turned their attention to the existing problems of the federal appellate system have reached the conclusion that some national resolution is needed for the nonconstitutional issues which are national in scope. . . .

It is proper to ask, can those nonconstitutional issues be resolved without recourse to a new national appellate court? . . .

[I]f these issues are to be resolved, there must be some increase in the capacity to hear judicial appeals. We believe that the Commission's recommendation for a National Court of Appeals would go far toward meeting this need. It would provide back-up capacity to decide cases which presently cannot be taken by the Supreme Court, and in most cases would do so without adding a third level of appeal to the existing two. But it would do more than that: it would allow a national decision to be rendered on national issues with only one appeal. This must result in great savings of

judicial time and, more important, far more rapid resolution or even avoidance of inter-circuit conflicts which have plagued the federal appellate system for too long. . . .

The National Court of Appeals recommended by the Commission, by hearing cases in which its decision is substituted for that of a circuit court, is thus capable of relieving the Supreme Court of that very part of the appellate burden which the Supreme Court has been forced to set aside most frequently—the nonconstitutional conflicts between the circuits. This part of the jurisdiction has been labeled “transfer jurisdiction.” But the Commission has also recommended that the National Court have a second kind of jurisdiction, the “reference” jurisdiction, over cases referred to it by the Supreme Court.

We would respectfully suggest that in devising the “transfer jurisdiction,” this Commission has “built better than it knew”. . . and that therefore that head of the new court’s proposed jurisdiction should be abandoned.

The great advantage of abandonment of the proposed reference jurisdiction is that the Supreme Court’s docket will remain inviolate. Much of the objection to the past proposals for similar courts has been raised on the assumption that they will be only a poor substitute for the Supreme Court. Certainly, any case referred to the court by the Supreme Court must bear the stigma of seeming less worthy than those cases which the Supreme Court decides itself. Furthermore, selection of cases for referral is likely to be inherently divisive and time-consuming for the Justices of the Supreme Court. We may expect dissents from certiorari to be a minor problem in comparison to dissents from referral. And, of course, referral necessarily insinuates an added layer of appellate review which is not present in the transfer jurisdiction.

[Document Source: *Hearings Before the Commission on Revision of the Federal Court Appellate System, Second Phase*, Volume II, April 15, 1975, 647–648.]

Judge Donald D. Lay, Value of Decentralized Decision Making, Testimony Before Hruska Commission, April 16, 1975

While Kutak praised the transfer jurisdiction outlined in the Hruska proposal, not everyone agreed that such a radical innovation was wise. Judge Donald Lay of the Eighth Circuit saw value in decentral-

ized decision making and took issue with the goal of expediting the resolution of conflicts among the circuits. Lay believed that giving litigants, lawyers, and judges time to reflect on important legal issues and allowing different jurisdictions to operate under competing interpretations of the law would ultimately result in the production of better law.

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I am also deeply troubled that the Commission has almost entirely overlooked the value of having important national legal questions resolved slowly, allowing many lower courts to approach the issue anew, each considering what others have done and yet rethinking the justice and policy of the question as it is presented on the particular facts before each court. This process of case-by-case adjudication allows the best efforts of many similarly situated litigants, rather than just the views of the parties to an important case of first impression, to be brought to bear on the problem. It gives time before the final decision for legal scholars, law review commentators, as well as organizations interested in a particular area of the law, such as the National Association of Manufacturers or the Sierra Club, to develop and publish their views.

The time lag in national resolution within the present system provides an even more vital input—practical experience gained by operating under a particular interpretation of the law in question. Where varying results are reached in different federal district and circuit courts, federal law will not be uniform throughout the country for some time. But in many cases the temporary hardship this causes is greatly outweighed by the benefits of being able to observe the practical results of adopting one interpretation as opposed to another. This permits the political system to see whether one method of desegregation works well before it is required throughout the land. It allows tax accountants and the IRS to determine whether one interpretation of certain deductions tends to distort taxable income in certain industries, or whether a regulation can easily be evaded through some unintended loophole. . . .

The Commission did, to be sure, realize that in some cases successive consideration by several circuits could be beneficial. They apparently assumed, however, that such cases were definitely a minority and further that they were readily identifiable as a class

right from the outset. Yet surely there are very few issues of which it can be said at the outset that the result will be made no more just, wise or clear if other courts consider it on other facts. An attempt to draw any guidelines for that identification process would be difficult indeed. Transfer jurisdiction could lead to premature decisions on seemingly simple questions, questions which re-examination below would have shown to be more complex and very important.

[Document Source: *Hearings Before the Commission on Revision of the Federal Court Appellate System, Second Phase*, Volume II, April 16, 1975, 907–908.]

Terrance Sandalow, Concern Regarding Overreliance on Constitutional Interpretation, Testimony Before Hruska Commission, April 15, 1975

Professor Terrance Sandalow of the University of Michigan Law School testified before the Hruska Commission, explaining his belief that a new appellate court would exacerbate the Supreme Court's tendency to hear mostly constitutional cases. Sandalow was concerned that splitting the Court's caseload would lead to even more "constitutionalization of the law." He contended that overreliance on constitutional interpretation to resolve major disputes diminished the importance of the lower courts and other branches of government in working through major legal and political problems.

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[I]t seems reasonable to suppose that the Supreme Court is likely to use the reference procedure primarily for non-constitutional cases, including a percentage of those over which the Court would otherwise feel compelled to take jurisdiction. Authoritative decision of non-constitutional issues by the National Court of Appeals pursuant to its transfer jurisdiction would further reduce the pressure on the Supreme Court to hear cases presenting such issues. My initial concern is that the consequence of all of this would be to strengthen the tendency toward converting the Supreme Court into a constitutional court. Perhaps it is too late to call that tendency into question; as the Commission observes, about two-thirds of the court's decisions now involve constitutional questions. Whether or not the trend can be reversed, however, there are many (among whom I count myself) who believe that it is un-

wise to give it further impetus. Some argue that the quality of the Court's consideration of constitutional issues is likely to suffer if the Court is engaged exclusively or almost exclusively in the consideration of constitutional issues—issues that are typically less structured than non-constitutional issues and in the decision of which craft tradition appears to play a smaller role. The court's continued involvement in traditional lawyer's work is, on this view, important to maintaining in the court a respect for those traditions of the lawyer's craft whose existence is essential if constitutional issues are to continue to be thought of as legal issues.

The more important concern, in my judgment, is that *de facto* conversion of the Supreme Court into a constitutional court will continue and perhaps accelerate the “constitutionalization” of our law that has occurred over the past two decades. My point goes beyond agreement or disagreement with the results of particular cases. One may believe, as I do, that many of the Court's decisions over the period were responsive to important problems confronting the nation and yet believe that the tendency to constitutionalize the law is undesirable. When legal doctrines are rested upon the Constitution, there is both a centralization of decision-making that inhibits alternative development that might provide useful experience and a transfer of power to the courts from more politically responsible institutions of government. Neither consequence seems to me to be desirable, though obviously there are at times only less desirable alternatives. The extent to which establishment of a National Court of Appeals would strengthen these tendencies in our law is, of course, only a matter of conjecture. No doubt, there are more important influences at work. But it seems worth considering whether establishment of such a court might plausibly be thought to contribute to the constitutionalization of the law, and, if it would, whether that price is too high.

[Document Source: *Hearings Before the Commission on Revision of the Federal Court Appellate System, Second Phase*, Volume II, April 15, 1975, 732–733.]

## American Bar Association Special Committee on Coordination of Judicial Improvements, Support for Reference Jurisdiction, Report of February 1976

In December 1975, Senator Hruska introduced a bill to establish a national court of appeals in accordance with his commission's recommendations. The following February, however, the American Bar Association's house of delegates voted to approve the new court but objected to the inclusion of transfer jurisdiction that would have allowed the U.S. courts of appeals to send cases to the new court for final resolution. In its report on the proposed legislation, the ABA Special Committee on Coordination of Judicial Improvements observed that reference jurisdiction was popular with Supreme Court justices and that it would allow the new court to contribute to predictability in the national law while still preserving the Supreme Court's complete control over its docket. In accordance with the ABA's house of delegates' position, the committee recommended postponing the implementation of transfer jurisdiction, thereby reversing the position its chair, Robert Kutak, had taken in his statement to the Hruska Commission the year before. As a result, in May 1976 Hruska introduced a new bill providing for reference jurisdiction while omitting transfer jurisdiction. Despite years of debate, the Senate Judiciary Committee never reported the bill favorably to the Senate, and it was never enacted.

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This Committee does not recommend support of the transfer jurisdiction at the present time. While the proposed transfer jurisdiction may ultimately prove valuable, it needs further study before being implemented. Most of the present justices of the Supreme Court who have addressed themselves directly to the question of the transfer jurisdiction have expressed reservations about it. It is likely to prove complex in operation. On the other hand, the reference jurisdiction is simple and its effect is clear. It would allow the Supreme [Court] to retain complete control over its docket. Most of the present Justices, in their comments to the [Hruska] Commission, addressed the question of the reference jurisdiction, and none perceived any difficulty with its functioning. . . .

The benefits of such a court to the practicing lawyer, and more importantly to his clients, would be many. The most important benefit would be the reduction of unpredictability in the law. In

the past, conflicting decisions on a single question of federal law have sometimes persisted for a decade or more simply because the Supreme Court lacked the decisional capacity to grant a hearing on the issue. The difficulty is greatest for the citizen in a circuit where no decision on the question yet exists—he does not know which of the conflicting decisions courts of his circuit may follow. In consequence, cases multiply in the lower courts as citizens attempt to ascertain the law of their own jurisdictions. Were that unpredictability to be removed, the lower courts would be relieved of a myriad of cases which had their genesis only in the incapacity of the Supreme Court to resolve crucial conflicts.

At the heart of the lawyer's role in society is his ability to advise clients on the propriety of their conduct. Predictability in the law is a necessary ingredient of this ability, without which our contribution to the public welfare is diminished. The National Court would approximately double the capacity for resolution of questions of national law, and should thus go far to reduce conflicts.

Not the least important benefit is the sheer increase in national appellate capacity. Aside from reduction of uncertainty and delay, there would be a hearing in a national forum for cases which now can never be heard in such a forum at all. The number of filings in the Supreme Court shows clearly that demand for national review is far greater than capacity. Comments made in Justices' opinions dissenting from denial of certiorari indicate that many cases worthy of hearing are not heard. The increased capacity offered by the new court would in itself help to meet citizens' expectations of due consideration by the appellate courts.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2762 and S. 3423, The National Court of Appeals Act*, Part 1, 94th Cong., 2nd sess., 1976, 30, 32–33.]

## *U.S. Court of Appeals for the Federal Circuit*

While considering proposals in the 1970s to redraw circuit boundaries and to create a national court of appeals, policymakers debated a third course of action to reform the federal appellate system: the establishment of one or more appellate courts specializing in particular areas of jurisdiction. These debates culminated in 1982 with the

creation of the U.S. Court of Appeals for the Federal Circuit, which was given jurisdiction over appeals from the U.S. Court of International Trade, the Merit Systems Protection Board, and agency boards of contract appeals, as well as patent appeals, appeals from certain administrative decisions, and appeals in certain cases involving claims against the U.S. government. The new court's jurisdiction was formed in part by combining the appellate jurisdiction of the U.S. Court of Claims and the jurisdiction of the U.S. Court of Customs and Patent Appeals, each of which was abolished and had its judges reassigned to the Federal Circuit.

Advocacy for a specialized appellate court was motivated in large part by complaints from the patent bar that inconsistent rulings by the U.S. courts of appeals in patent cases originating in the district courts had made litigation confusing, unpredictable, and overrun by forum shopping (i.e., attempting to have a case heard in a particular court believed most likely to produce a favorable result). Others had long called for a court to hear appeals in tax cases coming from the U.S. Tax Court and the district courts to harmonize the law in that area as well. Moreover, the increasingly powerful federal administrative state was generating a substantial amount of litigation over new regulations, such as those concerning environmental protection, leading some lawyers, professors, and lawmakers to recommend giving a specialized appellate court jurisdiction over such cases.

Opponents of creating a new appellate court defined by its jurisdiction had various concerns. Some believed that the federal judiciary would be best served by judges with experience in all types of litigation rather than in one narrow area, because even technical cases could present a wide range of legal issues. Relatedly, detractors predicted that judges of a specialized court could be tempted to make policy from the bench or, operating mainly out of public view, be captured by special interest groups. Lawyers representing patent plaintiffs were especially opposed to a national court for patent appeals, arguing that the disruption to their clients such a major change would pose was not worth the very minor relief the plan would provide to the U.S. courts of appeals.

After the failure of the national court of appeals bill in 1976, the Department of Justice's Office for Improvements in the Administration of Justice (OIAJ), headed by Daniel J. Meador, drafted a proposal for



a specialized court of appeals. Meador and his team focused on managing the growth in appellate caseloads in a way that would contribute to more uniformity in national law. In developing a plan, Meador sought to avoid particular issues that had caused controversy in earlier debates about appellate reform; shutting off access to the Supreme Court, adding an additional tier of review, or establishing courts with jurisdiction over only one narrow category of cases all appeared to be politically infeasible.

The OIAJ proposed a U.S. Court of Appeals for the Federal Circuit, to be an intermediate appellate court in the same sense as the other U.S. courts of appeals. The new court would combine the functions of the U.S. Court of Customs and Patent Appeals with those of the U.S. Court of Claims and handle appeals in tax, patent, and environmental cases. President Jimmy Carter called on Congress to establish the new court in 1979. As finally enacted, the bill that created the Federal Circuit hewed closely to the OIAJ proposal but omitted the controversial provisions that would have granted the court jurisdiction over appeals of tax and environmental cases.

Irving Kayton, Concern About Forum Shopping by Patent Bar, Testimony Before Hruska Commission, May 20, 1974

In 1974, the Commission on the Revision of the Federal Court Appellate System, better known as the Hruska Commission, conducted hearings on the structure of the appellate courts. The commission heard testimony from lawyers and academics charging that the federal appellate system was not fulfilling its responsibilities in the areas of patent, tax, and administrative law. Irving Kayton, a law professor at George Washington University, testified about how the lack of uniform interpretation between circuits and the uncertainty it created led to forum shopping by the patent bar.

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Forum shopping is odious not because it is practiced but because its necessity is a demonstration of a breakdown in the judicial system. Forum shopping among the eleven Circuits and the U.S. Court of Claims, it is regrettable to say, is the most important single job facing every patent trial lawyer in every patent case. Whether trial counsel represents the patentee or the alleged

infringer, he knows that the outcome of his case is initially largely determined by the selection of the Circuit in which his case is tried and appealed. . . .

In essence there are at least three different “patent systems” in the United States, all of which pay lip-service to the commendable landmark guidelines set out by the Supreme Court through Mr. Justice Tom C. Clark in the Trilogy of cases grouped under the style Graham v. John Deere. . . .

The important issue for the Commission to glean from the years of work which the writer has put in on this subject, is that despite the institutional safeguard at the apex of the appellate system, the Supreme Court, there is no homogenou[s] body of patent law in this country. . . .

My concern with this issue at this time is narrow. At the moment, questions such as those of judicial economy, political expediency and the like, important as they are, take second place to that of the integrity of the appellate function. This integrity has crumbled before our eyes in patent matters because of the heterogeneity of law among the Circuits about which the Supreme Court is institutionally incapable of doing anything.

[Document Source: *Hearings Before the Commission on Revision of the Federal Court Appellate System, Second Phase*, Volume I, May 20, 1974, 257–258.]

### Judge John Paul Stevens, Opposition to Specialized Appellate Courts, Testimony Before Hruska Commission, June 10, 1974

Judge John Paul Stevens of the Seventh Circuit (who was appointed to the Supreme Court soon afterwards) testified before the Hruska Commission in opposition to proposals for specialized appellate tribunals. While supporters of special courts argued that judges should have technical expertise to handle tax and patent cases effectively, Stevens disagreed, asserting that the judiciary would be best served by generalist judges. The adversarial system of litigation, he explained, was designed to bring out the truth, even in complex cases, regardless of the technical knowledge of the judge; even suits focused on technical questions would frequently implicate other legal issues with which a generalist judge would have experience. What the appellate system needed most, according to Stevens, was judges who were skilled at the basics of judging—namely, ensuring

the use of proper procedure and interpreting federal law in order to apply it to the facts of a case.

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We believe that judges with wide experience in all types of federal litigation possess qualities of judgment that the specialist may lack. As they watch the weaving of a seamless web, they may recognize risks that might be overlooked by one who is fascinated with the dexterity of a spider.

The federal judge's expertise in procedural fairness and in the interpretation of federal legislation and, I might interpolate, in applying law to facts in particular cases—we think this is often of overriding importance in specialized as in other forms of litigation. . . .

[I]t seems to me that to the extent the members of the Commission have stressed the expertise of the judge who may have scientific background, chemical background or technical background of one kind or another in the patent field, they are in effect suggesting that they wish to place slightly less reliance on the traditional virtues of the adversary system and slightly more reliance on the *ex parte* background of the arbiter of the dispute.

We have great confidence in the adversary system as a means of bringing out the truth in difficult cases as well as in easy cases.

In every field of the law there are cases which present unique issues as well as issues which parallel those repeatedly confronting judges. . . .

It is no doubt true that a tax lawyer or a patent lawyer would analyze such an issue much more quickly than a general practitioner. On the other hand, the difficulties faced by the generalist in such cases are not unlike those faced every time a question of statutory construction is confronted for the first time or the record discloses an unusually complex set of facts.

I would simply interject at this point that it is not by any means true that patent cases are the only kind of cases that are difficult. Furthermore, there are many, many patent cases which are not at all difficult in themselves. Some of them involve a great amount of technical matter; others involve very simple questions of understanding the basic technology involved.

Purely in terms of efficiency, the creation of a specialized patent court, for example, will not necessarily be an unmixed blessing, for new jurisdictional issues would arise in cases in which antitrust, contract or common law trade secret questions overlap with patent questions. . . .

If we accept the premise, as members of our court do, that the administration of justice in the federal courts was better served without specialized courts prior to the workload crisis, we also conclude that it would be a mistake to turn to specialization as an expedient to diminish the crises.

[Document Source: *Hearings Before the Commission on Revision of the Federal Court Appellate System, Second Phase*, Volume I, June 10, 1974, 512–514.]

### Hruska Commission, Opposition to Creation of Specialized Courts, Report of June 20, 1975

The Hruska Commission ultimately declined to recommend the creation of specialized courts as a solution to the problems facing the appellate system. Its report cited a number of concerns that had been raised for decades about specialized courts, such as the fear that judges having expertise in a narrow category of cases would seek to make policy from the bench or that special interest groups might ultimately “capture” the court. Furthermore, the commission felt that a national court devoted to a particular area of jurisdiction would eliminate the regional influences on the development of the law provided by the U.S. courts of appeals.

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Some have suggested that the lack of capacity to declare the national law should be remedied by the creation of specialized courts, specifically a court of tax appeals and a court of patent appeals. . . . The debate over the desirability of such courts has spawned a rich literature, focusing on the special needs of the respective specialties on the one hand, and, on the other, on broader concerns with the factors which make for the highest quality of appellate adjudication.

After extensive discussion the Commission has concluded that, on balance, specialized courts would not be a desirable solution either to the problems of the national law or, as noted elsewhere, to the problems of regional court caseloads. . . .

Judges of a specialized court, given their continued exposure to and great expertise in a single field of law, might impose their own views of policy even where the scope of review under the applicable law is supposed to be more limited. Vesting exclusive jurisdiction over a class of cases in one court might reduce the incentive, now fostered by the possibility that another court will pass on the same issue, to produce a thorough and persuasive opinion in articulation and support of a decision. Furthermore, giving a national court exclusive jurisdiction over appeals in a category of cases now heard by the circuit courts would tend to dilute or eliminate regional influence in the decision of those cases. Our nation is not yet so homogenous that the diversity of our peoples cannot be reflected to some advantage in the decisions of the regional courts. Excluding these courts from consideration of particular categories of cases would also contract the breadth of experience and knowledge which the circuit judges would bring to bear on other cases; the advantages of decision-making by generalist judges diminish as the judges' exposure to varied areas of the law is lessened. Finally, concern has been expressed about the quality of appointments to a specialized court, not only because of the perceived difficulties in finding truly able individuals who will be willing to serve, but also due to the fear that because the entire appointment process would operate at a low level of visibility, particular seats or indeed the court as a whole may be "captured" by special interest groups.

[Document Source: Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, June 20, 1975, 28–29.]

Charles R. Haworth and Daniel J. Meador, Proposal for Federal Circuit, *University of Michigan Journal of Law Reform*, Winter 1979

Charles R. Haworth and Daniel J. Meador at the Department of Justice's Office for Improvements in the Administration of Justice wanted to find a solution to lawyers' concerns that tax and patent law suffered from a lack of national uniformity, while avoiding the pitfalls of specialized courts. Meador proposed to Haworth that the agency map out a plan for a new Federal Circuit that would have a rotating staff of circuit judges to hear both tax and patent appeals from the district courts. The plan addressed one major concern about spe-

cialization by utilizing generalist judges rather than patent or tax experts. Haworth was the first to suggest that the new appellate court have jurisdiction over patent and tax appeals as well as the appellate jurisdiction of the Court of Claims and the jurisdiction of the Court of Customs and Patent Appeals. Haworth proposed that the new court hear appeals in environmental cases in addition as a way to further dilute the specialization of the court. In July 1978, the OIAJ released its initial proposal, which reflected Meador and Haworth's original conversations except that the new court would consist of the twelve judges of the merging courts plus three additional judges, and that the court would be authorized to sit in panels larger than three. Soon after, Meador and Haworth authored a law review article to promote the concept.

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In several respects, this proposal should be more acceptable than previous recommendations for appellate court reorganization. It is designed to avoid the objections to prior proposals and to meet the imperatives that must be observed if any appellate court reform effort is to succeed.

*1. A Nonspecialized Court*—Specialization is a major pitfall to be avoided. Opposition to a court with jurisdiction limited to a single, narrow category of cases rests on twin concerns: the court could foster the development of “tunnel-visioned” judges who take too limited and arcane a view toward the development and application of the law; and the court would be vulnerable to capture by a special interest. . . .

*2. Avoids Previous Objections*—The proposal also observes other imperatives of appellate court reform that have emerged from the experiences of recent years. First, it does not add a fourth tier to the federal judicial system. The court would be part of the intermediate appellate level; the designated cases would go directly from the trial courts to this court for review instead of going to one of the regional courts of appeals.

Second, the proposed intermediate court would be composed of permanent Article III judges who have important adjudicative tasks. The new court would have basically the same mission as the two existing courts, but it would have additional important and varied legal questions to decide.

Third, the jurisdiction and position of the new court within the system would not diminish the status of existing courts and judges since its location in the federal hierarchy would be on a level with the regional courts of appeals.

The proposal also meets a fourth imperative of federal court reform—flexibility in the appellate system to meet changing docket conditions. Once such a court was created, with nationwide appellate jurisdiction, Congress would have available a forum to which it could add categories of business if it appeared in the future that a special need had emerged for definitive national adjudication. Congress could also withdraw jurisdiction in later years if the need for such a forum for the presently designated cases diminished in relation to other types of cases.

Fifth, access to and review by the Supreme Court would remain available. Under this proposal certiorari review in the Supreme Court would be preserved. However, the need for such review would be lessened because of the enhanced authoritative-ness and uniformity of the decisions rendered by the new appellate court.

Furthermore, the proposal would not unduly expand the number of judges or courts within the federal judicial system. This proposal would require the creation of only three additional judgeships. Moreover, the consolidation of the Court of Claims and the CCPA would simplify the judicial structure and hence reduce problems of judicial administration.

[Document Source: Charles R. Haworth and Daniel J. Meador, "A Proposed New Federal Intermediate Appellate Court," *University of Michigan Journal of Law Reform* 12, no. 2 (Winter 1979): 227–230.]

Erwin N. Griswold, Support for Creation of U.S. Court of Tax Appeals, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, May 7, 1979

In March 1979, two similar bills to create the U.S. Court of Appeals for the Federal Circuit and to carry out other judicial reforms were introduced in the Senate. When the two bills were merged, the proposed legislation included a provision for a new U.S. Court of Tax Appeals, which had been suggested by Senator Edward Kennedy of Massachusetts, the chair of the Senate Judiciary Committee. Among

those supporting the bill was former Solicitor General of the United States Erwin N. Griswold. Griswold was the author of an influential 1944 *Harvard Law Review* article on the need for a court of tax appeals<sup>33</sup> and remained an important commentator on the federal courts throughout his career. In his testimony during hearings on the Federal Courts Improvement Act, Griswold emphasized that practicing lawyers were struggling with uncertainty in important areas of federal law because of the lack of appellate capacity. In his view, the organization of courts on the basis of subject matter rather than geography was the most promising way to deal with the problem.

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In our well-warranted concern for the courts, we tend to forget that most of the law in this country is administered in law offices, private and governmental. The judicial system would surely collapse if this were not so. Under our present system, though, the process of administration is made extremely difficult. A careful lawyer cannot advise his client that the law is one way or another. About the most he can say is that there are three decisions in the courts of appeals which go this way, and two that go that way. In addition, there are decisions in two other circuits which are not wholly clear. It is true that one of the cases against us is in this circuit. However, I cannot advise you to proceed according to that decision, because this is an area where the Supreme Court may grant certiorari, perhaps years hence, and there is no way to predict what way the Supreme Court would decide the case.

The question is equally difficult for Government lawyers. They cannot rely on the decisions of the several courts of appeals any more than the private lawyers can. The result is continuing uncertainty, encouragement to litigation, and a premium on continued litigation. I am sure that the burden on the courts in this country would be considerably reduced if we only had a system which would enable lawyers, both private and public, and judges of the lower courts, to know somewhat more definitely than is now the case what the law is.

33. Erwin N. Griswold, "The Need for a Court of Tax Appeals," *Harvard Law Review* 57, no. 8 (October 1944): 1153–1192.



This is especially true in areas where there are a large number of recurring questions, no one of which is of great importance by itself, and most of which are not worthy of review by the Supreme Court of the United States.

There are a number of fields in which such questions are concentrated. One of these is the Federal tax field. Another is that of patents and trademarks. It seems likely that the same thing is developing in the area of environmental law, and of energy. The same may be true of antitrust. . . .

The problem arises because our system provides no nationwide answer for any question until the Supreme Court has decided it—and the Supreme Court can, in the nature of things, decide very few cases.

The fact is that we badly need more appellate capacity. The dockets of the U.S. courts of appeals are nearly overwhelmed. The time has come, I feel sure, when we must provide more appellate capacity. We can make the most progress, I think if we establish some new courts of appeals on a topical basis, rather than on a geographical basis. This will provide courts, below the Supreme Court, which can make decisions which are nationally binding in their designated areas. The decisions of these courts would be subject to review by the Supreme Court, but it seems clear in advance that the Supreme Court would rarely exercise its discretion to review these decisions, since there would be no conflicts, and most of the questions decided . . . would not be worthy of Supreme Court review. . . .

Indeed, we have such a court already, in the Temporary Emergency Court of Appeals. A court with that name was established during World War II for the purpose of reviewing decisions in the area of price control. The name was used again in establishing the present court which reviews decisions in the field of energy. Those courts have worked very well. What we need is more of them.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 677 and S. 678, Federal Courts Improvement Act of 1979*, 96th Cong., 1st sess., 1979, 47–48.]

Albert E. Jenner, Opposition to Centralization of Patent Appeals, Testimony Before Senate Subcommittee on Courts of the Committee on the Judiciary, May 18, 1981

The bill for a court of tax appeals was reported favorably by the Senate Judiciary Committee as a separate bill, leaving its fate to be determined independently of the bill for the Federal Circuit. The Senate passed the bill for the Federal Circuit by a voice vote in October 1979, while no action was taken on a court of tax appeals.

Patent attorneys that represented large corporate clients generally supported the patent jurisdiction of the new Federal Circuit, but other lawyers, who sometimes represented patent plaintiffs, voiced opposition to the plan. Speaking for the Committee to Preserve the Patent Litigation of the Courts of Appeals, Albert Jenner argued that the centralization of patent appeals would make little difference in terms of alleviating the docket pressures on the courts of appeals, since patent cases made up a minuscule portion of their caseloads. Jenner asserted that a national court with jurisdiction based on subject matter rather than geography represented a major and unwarranted alteration to federal court structure. While Jenner focused his testimony mainly on the lack of benefits to be derived from the Federal Circuit plan, other attorneys testifying alongside him repeated concerns others had expressed about the potential pitfalls of specialized courts.

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The House Judiciary Committee report asserted that a single national patent appeals tribunal would help to alleviate docket pressures on the regional courts of appeals (H. Rept. No. 96-1300 at 16). But, in fact, how many patent appeals are filed annually, and to what extent will transfer of this jurisdiction relieve caseload pressure on the courts of appeals around the country? The data that we have assembled show that in 1978, 163 patent appeals were filed nationally and in 1979, the number was approximately 192. (This figure may be slightly inflated since it includes trademark cases.) Moreover, recently compiled data for fiscal year 1980 indicate only 119 patent appeals filed in the eleven circuit courts of appeals. Thus, these cases account for approximately 1% of the total appellate caseload. While there may be other reasons advanced for a new patent court of appeals, the data simply do not support the claim that a new national court will relieve docket congestion or ease caseloads in the Courts of Appeals. . . .

We would add that certainty in the law, which some in the patent field seek at any price, is simply not worth the far-reaching disruption of the administration of justice in the federal appellate court structure that I believe would follow. . . .

[W]hat is being proposed today as a modest rearrangement of the jurisdiction of two existing courts, in fact, may be the precursor of a super court with expanding national jurisdiction in specific subject matter areas of the law. It represents a fundamental restructuring of federal appellate justice without parallel or precedent.

[Document Source: U.S. Senate, Subcommittee on Courts of the Committee on the Judiciary, *Hearing on S. 21, A Bill to Establish a United States Court of Appeals for the Federal Circuit, to Establish a United States Claims Court, and for Other Purposes*, 97th Cong., 1st sess., May 18, 1981, 75–78.]

### Donald R. Dunner, Support for Centralization of Patent Appeals, Testimony Before Senate Subcommittee on Courts of the Committee on the Judiciary, May 18, 1981

In 1974, Donald R. Dunner, the former president of the American Patent Law Association, and James B. Gambrell, an intellectual property law expert and law professor at the University of Houston, acted as consultants to the Hruska Commission on the subject of centralizing patent appeals in a special court. Dunner and Gambrell stressed to the commission that it must take action to halt the practice of forum shopping in patent litigation, and they became strong supporters of centralizing patent appeals in a new federal circuit. In his statement to Congress in 1981, Dunner explained that the Senate bill his organization favored, S. 1477, would strengthen the application of the patent laws, stop forum shopping in patent litigation, and ultimately help spur greater innovation. In responding to objections that judges of a specialized court would develop tunnel vision and the quality of adjudication would suffer, Dunner pointed out that the plan provided for a wide jurisdictional base for the new court, while also noting the high quality of the judges of the Court of Customs and Patent Appeals and the Court of Claims, who would become the first Federal Circuit judges.

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[W]hile there may not be extensive conflicts in, the holdings of the various federal circuit courts of appeal on given legal issues, the present judicial system for reviewing patent disputes has

generated extensive differences in the various circuits' application of the patent law which, in turn, has generated actual and perceived differences in the degree of hospitality which the different circuits accord to patents which, in turn, has generated widespread forum shopping by both patentees and alleged infringers seeking forums most favorable to their point of view, which in turn has inordinately increased litigation expenses and made it extremely difficult for patent lawyers to advise their clients as to the likelihood of success in a given case. . . .

No doubt the oft-repeated and fundamental objection to each proposal for any "special" patent court has been that previously noted in connection with the Hruska Commission study, that the quality of decision-making would suffer as the specialized judges become subject to "tunnel vision," seeing the cases in narrow perspective without the insight stemming from broad exposure to legal problems in a variety of fields. Perhaps the single most significant advantage of S. 1477 is that it significantly disarms this objection by providing the judges on the new Court of Appeals for the Federal Circuit with a fairly broad jurisdictional base, which would include patents, trademarks, customs, government contracts, Indian claims, etc., not to mention the vast array of issues which invariably are generated in patent and trademark litigation including those involving contracts, antitrust, trade secrets, unfair competition, and more.

Moreover, S. 1477 should put to rest other concerns, expressed by the Hruska Commission and others, regarding so-called "special" courts. Thus, concern that vesting exclusive jurisdiction over a class of cases in one court might reduce the incentive to produce a thorough and persuasive opinion in articulation and support of a decision is belied by the articulated opinions generated by existing specialized courts such as the Court of Customs and Patent Appeals, whose opinions have been cited with great regularity in recent years and which would form part of the new Court of Appeals for the Federal Circuit. Concern as to the quality of appointments to a specialized court has some historical justification but is significantly undermined by the relatively high quality of the appointments to courts such as the Court of Customs and Patent Appeals and the Court of Claims over the past 20-year period. And, concerns over possible dilution or elimination of regional influences in the decision-making process of patent cases and the possible

contraction of the breadth of experience and knowledge which the generalist circuit judges would otherwise bring to bear on other cases are deemed to be extremely marginal and questionable considerations which, assuming their more than marginal significance, hardly counterbalance the potential advantages of a national court having exclusive patent jurisdiction of the type contemplated by S.1477, which cannot help but have a stabilizing influence in the interpretation and application of the patent laws and increase industry's confidence in and reliance upon the patent grant, the cornerstone of the innovation system.

[Document Source: U.S. Senate, Subcommittee on Courts of the Committee on the Judiciary, *Hearing on S. 21, A Bill to Establish a United States Court of Appeals for the Federal Circuit, to Establish a United States Claims Court, and for Other Purposes*, 97th Cong., 1st sess., May 18, 1981, 208, 211–212.]

#### Senate Judiciary Committee, Diverse Docket of New Court, Report of November 18, 1981

The bill to create the Federal Circuit was linked to a host of judicial reforms, including new procedures for judicial discipline, which gave rise to opposition in the House of Representatives and led to delay in the bill's consideration. During 1980, however, the more efficient handling of patent cases became a central ingredient in a broader Carter administration push for policies to enhance industrial innovation and the House passed a version of the bill in September 1980. The Senate and the House failed to resolve differences in their versions of the bill during the 96th Congress, however, and final passage of the bill did not come until the end of 1981 after a new round of hearings in both houses.

The Senate Judiciary Committee report recommending passage of the Federal Court Improvements Act of 1981 emphasized that the Court of Appeals for the Federal Circuit, while centralizing patent litigation, would have a diverse docket and did not constitute a court that would suffer from potential problems of specialization.

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While the suggestion has been made that [increased certainty] might be accomplished simply by expanding the jurisdiction of the CCPA, the committee rejected such an approach as being inconsistent with the imperative of avoiding undue specialization within the Federal judicial system. . . .

The Court of Appeals for the Federal Circuit will not be a “specialized court,” as that term is normally used. The court’s jurisdiction will not be limited to one type of case, or even to two or three types of cases. Rather, it will have a varied docket spanning a broad range of legal issues and types of cases. It will handle all patent appeals, plus government claims [cases] and all other appellate matters that are now considered by the CCPA or the Court of Claims—cases which contain a wide variety of issues.

This rich docket assures that the work of the proposed court will be broad and diverse and not narrowly specialized. The judges will have no lack of exposure to a broad variety of legal problems. Moreover, the subject matter of the new court will be sufficiently mixed to prevent any special interest from dominating it.

[Document Source: U.S. Senate, Committee on the Judiciary, *The Federal Courts Improvement Act of 1981*, S. Rep. 97-275, 97th Cong., 1st sess., November 18, 1981, 6.]

# Criminal Justice Reform

In the mid-twentieth century, policymakers began to discuss wide-ranging criminal justice reforms. Many of the specific issues under consideration related to the rights of criminal defendants from the time of their arrest until after conviction and sentencing. These discussions occurred in the context of a greater focus on individual rights in the 1960s—in large part as a result of the Civil Rights Movement—that included several Supreme Court decisions expanding constitutional protections for those charged with crimes.

The intersection of an increased focus on defendants' rights with greater societal concern about poverty—exemplified by the Kennedy and Johnson administrations' efforts on the subject—led to a movement among judges, lawyers, legislators, and academics to better enforce the Sixth Amendment right to counsel for criminal defendants unable to afford an attorney. As a result, the Criminal Justice Act of 1964 created a system to compensate court-appointed defense attorneys in federal court.<sup>34</sup> The Act did not authorize the creation of public defender offices by the judicial districts. Many lawyers, while favoring better access to counsel, were uncomfortable with the notion of defense attorneys in the employ of the federal government—the very same entity that was prosecuting the defendants. Later amendments to the Act, however, gave districts the option of establishing such offices.<sup>35</sup>

The focus on indigent criminal defendants shared by many members of the legal profession as well as social scientists, philanthropists, and governmental officials also led to efforts to reform the federal bail system. Most of the participants in discussions of bail reform agreed on the injustice of a system in which a defendant's chances of being released from jail while awaiting trial were dependent on his or her financial means. Most of the debate therefore focused not on whether to reform the system, but on how best to do so. Reforms creating nonmonetary conditions of pretrial release led to fewer incarcerated

34. Criminal Justice Act of 1964, 78 Stat. 552 (1964).

35. For more background on the effort to provide representation to indigent defendants in criminal court, see Geoffrey T. Cheshire, "A History of the Criminal Justice Act of 1964," *Federal Lawyer* 62, no. 9 (October/November 2015): 67–74.

defendants, sparking a debate about preventive detention, or the withholding of bail, to keep communities safe from potentially dangerous defendants. The preventive detention debate was contentious, as many critics saw the proposal as trampling on the presumption of innocence in exchange for a potentially illusory promise of greater safety.<sup>36</sup> The controversial nature of preventive detention impeded the passage of any bill in the 1970s. Instead, reformers' focus shifted to greater enforcement of the constitutional right to a speedy trial, resulting in the Speedy Trial Act of 1974.<sup>37</sup> A preventive detention bill did pass as part of the comprehensive crime control legislation of 1984, a product of the "tough on crime" movement of the 1980s.<sup>38</sup>

Debates about reform of the criminal justice system extended beyond pretrial procedures when Congress in the 1970s began to consider major changes to the federal sentencing system. While judges were split on the subject, sentencing reform garnered strong support among lawmakers because both liberal and conservative members of Congress had reason to believe that federal judges had too much discretion in the process, leading to drastically different sentences for similar crimes. While liberals were more likely to focus on defendants' rights and conservatives on creating more stringent sentences as a deterrent, most agreed that consistency in sentencing was a desirable goal. Some judges argued in favor of preserving judicial discretion over sentencing, but their voices were drowned out by strong bipartisan support for a sentencing commission that would promulgate guidelines for judges to follow. Much of the congressional debate focused on the ratio of judges to non-judges that the body would comprise and whether the commissioners would be chosen by the Judicial Conference of the United States or by the president with the advice and consent of the Senate.<sup>39</sup> The U.S. Sentencing Commission came

36. Further information on debates over pretrial detention can be found in Allen Daniel Applbau, "As Time Goes By: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974," *Cardozo Law Review* 8, no. 5 (April 1987): 1055–1096. For a discussion of earlier bail reform efforts, see Thomas H. Wayne, *Bail Reform in America* (Berkeley: University of California Press, 1976).

37. Speedy Trial Act of 1974, 88 Stat. 2076 (1975).

38. Bail Reform Act of 1984, 98 Stat. 1976 (1984).

39. For further reading on the history of sentencing reform, see Kate Stith and Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago: University of Chicago Press, 1998).



into being in 1984 and its first guidelines went into effect three years later.<sup>40</sup> The guidelines were mandatory until a 2005 Supreme Court decision required that they be treated as merely advisory.<sup>41</sup>

A final area of criminal justice reform focused on limiting the federal remedy of habeas corpus for those incarcerated by state and federal courts. In the 1950s and 1960s, a series of Supreme Court decisions expanded the opportunities for prisoners to challenge the legality of their detention in federal court through a so-called collateral attack. Apart from the implications for federalism of federal courts conducting reviews of a large number of state court criminal convictions, the federal courts were swamped with habeas corpus petitions. After a debate that pitted the goals of efficiency and finality of criminal convictions against the desire for robust protection of the constitutional rights of vulnerable citizens, Congress chose to place strict limits on habeas corpus petitions by passing the Antiterrorism and Effective Death Penalty Act of 1996.<sup>42</sup> The Act greatly reduced the number of petitions that could be filed and required that greater deference be given to the factual findings made during state court criminal proceedings.<sup>43</sup>

## *Counsel for Indigent Defendants in the Federal Courts*

The Sixth Amendment to the U.S. Constitution guarantees an individual accused of a crime the right “to have the Assistance of Counsel for his defense.” Not until the twentieth century, however, did the

40. Sentencing Reform Act of 1984, 98 Stat. 1987 (1984).

41. *United States v. Booker*, 543 U.S. 220 (2005). The Court in *Booker* declared the guidelines to be “effectively advisory” in light of its ruling that an enhanced sentence under the guidelines, based on facts found by the judge but not proved before the jury, violated the defendant’s Sixth Amendment right to a jury trial. 543 U.S. at 245.

42. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (1996).

43. For more background on debates over habeas corpus reform, see Eric M. Freedman, “*Brown v. Allen*: The Habeas Corpus Revolution that Wasn’t,” *Alabama Law Review* 51, no. 4 (Summer 2000): 1541–1624; and Justin J. Wert, *Habeas Corpus in America: The Politics of Individual Rights* (Lawrence: University Press of Kansas, 2011). Further discussion of the AEDPA can be found in Mark Tushnet and Larry Yackle, “Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act,” *Duke Law Journal* 47, no. 1 (October 1997): 1–86.

Supreme Court of the United States and Congress gradually give substance to the right to counsel. Federal district judges had discretion over whether to appoint counsel for indigent criminal defendants until 1938, when in the case of *Johnson v. Zerbst* the Supreme Court made such appointments mandatory.

While establishing the right to counsel in principle, the *Johnson* decision did not mandate the creation of a system for appointing and compensating criminal defense attorneys. District judges typically appointed attorneys with whom they were familiar, and sometimes attorneys who just happened to be in the courtroom. Counsel appointed to such cases contributed their time and resources pro bono, or without compensation.

The federal courts lagged behind state and local courts in the movement for representation of indigent defendants. Large cities took the lead in creating government-run public defender offices. The city of Los Angeles established the first such office in 1914, and by 1957 there were public defender systems of various types operating in fifteen states, which included seventy county public defenders and city public defenders in Los Angeles, Long Beach, San Francisco, St. Louis, and Columbus.<sup>44</sup>

For decades, judges, lawyers, and members of Congress debated how best to provide attorneys to indigent federal defendants and to compensate those attorneys for their work. The leading proposal, dating from 1937, was for the creation of public defender offices with full-time, salaried attorneys in the federal judicial districts. U.S. Attorneys General beginning with Homer Cummings praised local public defender offices and urged Congress to authorize them in the federal courts. The American Bar Association first endorsed public defenders in federal court in 1939, and the Conference of Senior Circuit Judges (known later as the Judicial Conference of the United States), after appointing a committee to examine the issue, endorsed legislation in 1944 to create public defender offices in the largest districts. By the mid-1950s, the issue of adequate defense for indigent defendants had gained national prominence.

Despite bills submitted throughout the 1950s and early 1960s, Congress did not pass any legislation creating public defenders or au-

44. Ellery E. Cuff, "Public Defender System: The Los Angeles Story," *Minnesota Law Review* 45, no. 5 (1961): 715–736.

thorizing the compensation of court-appointed counsel. Some judges and members of the bar expressed fears that a public defender threatened individual rights by placing prosecution, adjudication, and defense under the umbrella of the federal government. Legal aid societies expressed concern that a federally funded system would marginalize their role in providing counsel to indigent defendants. Other lawyers went so far as to oppose government compensation for defense attorneys altogether, believing that providing counsel to indigent clients was part of a public service owed by the profession.

The Supreme Court's 1963 decision in *Gideon v. Wainwright* sparked action in Congress. In *Gideon*, the Court ruled that the Sixth Amendment right to counsel even in noncapital criminal cases applied to the states as well. With the expectation that most states would establish systems for appointing counsel, many federal lawmakers believed that it was time to create a system that compensated court-appointed attorneys and afforded indigent defendants the best possible representation in federal court. The Criminal Justice Act of 1964 (CJA) authorized the payment of hourly compensation rates and reimbursement of reasonable out-of-pocket expenses for appointed lawyers. It also authorized the payment of expert and investigative services necessary for an adequate defense.

What the CJA did not do was authorize federal judicial districts to establish public defender offices. In 1967, the Judicial Conference and the Department of Justice commissioned a study of the CJA, led by Dallin Oaks of the University of Chicago Law School. The Oaks Committee issued a report the following year in which it recommended the creation of full-time public defenders in the nation's largest districts. In a nod to those that hoped to keep nonprofits engaged in indigent defense, the 1970 amendments to the CJA left to the districts the option of creating a federal public defender office or enlisting a community defender organization to be established by the private bar.

Committee to Consider the Adequacy of Existing Provisions for the Protection of the Rights of Indigent Litigants in the Federal Courts, Endorsement of Compensation for Appointed Counsel, Report of September 26, 1944

The Conference of Senior Circuit Judges had been publicly urging action to improve representation for poor defendants since 1937 and approved in principle the appointment of a public defender in

districts where the number of criminal cases warranted it. In other districts, the Conference recommended that “in exceptional cases involving a great amount of time and effort on the part of counsel” judges be authorized to set compensation to be paid by the government. In 1941, the Conference, with four dissenting votes, endorsed compensation legislation in light of the fact that Congress had not passed a public defender bill.

At its 1943 meeting, the Conference of Senior Circuit Judges appointed a committee headed by Judge Augustus N. Hand to study the state of representation for poor defendants in the federal courts. Hand and his fellow judges praised the bar for representing indigent defendants without compensation but concluded that the burden fell upon too few attorneys. Simply expanding the number of attorneys relied upon, the committee asserted in its report, risked employing individuals without the necessary skills and expertise and leaving defendants with inadequate representation. The committee therefore endorsed legislation to give judicial districts the option to employ public defenders or establish compensation for assigned counsel on a case-by-case basis.

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It is to the honor of the legal profession that members of the bar respond cheerfully to the calls of the courts to represent poor and friendless defendants, accused sometimes of the most revolting crimes. Yet it is clear that when the cases of poor persons needing defense become numerous and occur repeatedly, the voluntary and uncompensated services of counsel are not an adequate means of providing representation. To call on lawyers constantly for unpaid service is unfair to them, and any attempt to do so is almost bound to break down after a time. To distribute such assignments among a large number of attorneys in order to reduce the burden upon any one, is to entrust the representation of the defendants to attorneys who in many cases are not proficient in criminal trials, whatever their general ability and who for one reason or another cannot be depended upon for an adequate defense. Too often under such circumstances the representation becomes little more than a form.

Probably always there will be occasions to assign counsel to represent otherwise defenseless persons without compensation. It would be regrettable if this unselfish service on the part of mem-

bers of the bar should wholly disappear. Yet it has been apparent for some time that it is not a sufficient means of giving effect to the constitutional right of poor persons accused of crime to the assistance of counsel.

[Document Source: Conference of Senior Circuit Judges, *Report of the Committee to Consider the Adequacy of Existing Provisions for the Protection of the Rights of Indigent Litigants in the Federal Courts*, September 26, 1944, 2.]

Representative Emanuel Celler, Support for Federal Public Defenders, Testimony Before House Subcommittee No. 2 of the Committee on the Judiciary, May 14, 1959

By the end of the 1950s, the question of whether federal courts should have public defenders had risen to national prominence. Citing a survey showing that only three states had statewide public defender systems, a 1957 *New York Times Magazine* article reported on the growing “plea for the public defender.”<sup>45</sup> In 1959, the House Judiciary Committee took up consideration of a series of bills dealing with counsel for indigent defendants.

U.S. Representative Emanuel Celler of New York, chair of the House Judiciary Committee and author of one of the bills, was among the most active supporters of a federal public defender. In his statement to a subcommittee of the Judiciary Committee, Celler asserted that Congress owed a duty to defendants to ensure that they received zealous representation. He highlighted that the vast majority of defendants in federal courts pleaded guilty without the assistance of counsel, and that those with appointed counsel also pleaded guilty in most cases, likely on the recommendation of counsel who lacked the resources to mount a strong defense in court.

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The American system of justice is, of course, grounded on adversary procedures. Out of contending forces and conflicting argument substantial justice is somehow expected to emerge—not complete justice mind you, but “substantial justice” as the phrase goes in legal jargon. This is more apt to occur if each side has full opportunity to present all the facts and all the law of the

45. William P. Rogers, “Plea for the Public Defender,” *New York Times Magazine*, April 21, 1957, 26, 56, 58.

case. Yet even substantial justice, to the public as well as to the defendant, cannot result if the defense is half hearted and perfunctory. When the impoverishment of the accused prevents him from securing competent counsel, witnesses, psychiatrists, or other experts where indicated, he must enter this fight with his arms virtually pinioned behind him. The adversary procedures of American justice work only when the advocates on each side present their cases with equal vigor, backed up by fairly equal resources.

It is little wonder that numerous court-appointed attorneys who have no funds except their own to run down cases and leads habitually elect to forgo this uneven battle. With their income dependent on paying clients, more often than not they plead their indigent clients guilty. During 1957, 90 percent of the 26,254 persons convicted in Federal courts were pleaded guilty. . . .

This 90 percent seems a high figure however you view it. . . . Equally startling is the fact that of those who plead guilty about three-fourths enter this plea without any legal assistance whatsoever.

In other words, about 18,000 Federal offenders are convicted with no one to help them decide whether this is the wisest course or whether they are even pleading guilty to the correct charge. They act on jailhouse chatter and the hope that they will get off with a lighter sentence if they don't run the risk of irritating the judge, inciting the prosecution or the press, or bringing up in open court some disquieting facts about themselves. And too many of them believe that the kind of counsel they are likely to get will do them more harm than good.

Contrast this with the tactics of a knowledgeable, experienced, and well-paid counsel. He will, of course, carefully investigate the facts before he permits his clients to enter a plea of any kind. Even then he will not plead the defendant guilty if he thinks there may be some point of law he can later appeal or if he can prolong the trial to the point where the judge will commit error. Some shrewd criminal lawyers may try to confuse the jury or get a guilty man off through appeal to prejudice or resort to some trick.

Rich income tax violators, defaulting bankers, and big time racketeers seldom plead guilty. A few do, but they have knowledgeable attorneys who strike a bargain with the prosecutor as

to the crime to be charged, the counts in the indictment to be dismissed, or the kind of sentence to be recommended. But the indigent defendant in the ordinary case has no one really willing to put up a vigorous fight for him. So he pleads guilty and hopes for the best. That is why experienced observers of what goes on in Federal courts are convinced that the present system of unpaid assigned counsel, rather than merits of the cases, accounts for so large a percentage of guilty pleas. . . .

It is time to admit that the present system does not work and time to adopt a fairer, more workable means of assuring that all our citizens receive “equal justice under law.” . . .

If the guarantee of [the Sixth] amendment is to be meaningful for those who cannot afford competent counsel, the community must undertake the responsibility of providing and paying for necessary defense counsel just as it provides and pays for prosecution staffs.

[Document Source: U.S. House of Representatives, Subcommittee No. 2 of the Committee on the Judiciary, *Hearings on H.R. 4185, H.R. 4609, and H.R. 6864, to Provide for the Representation of Indigent Defendants in Criminal Cases in the District Courts of the United States and H.R. 2271, to Amend Title 18 of the United States Code so as to Allow Compensation to Counsel Assigned by the Court in Criminal Cases*, 86th Cong., 1st sess., 1959, 173–174, 177.]

Judge E. J. Dimock, Opposition to Federal Public Defenders, Testimony Before House Subcommittee No. 2 of the Committee on the Judiciary, May 6, 1959

The most forceful and prolific opponent of federal public defender offices was Judge E. J. Dimock of the U.S. District Court for the Southern District of New York. In speeches, journal articles, and testimony before Congress, Dimock praised the work of legal aid societies and systems that assigned counsel privately, and argued that defense attorneys employed full-time by the government posed a threat to the quality of representation as well as to civil liberties. Dimock candidly linked his fears with broader anticommunist sentiments, warning against excessive government authority and the future possibility of a “police state,” in which private attorneys no longer played a role in the criminal justice system. Testifying before a House Judiciary Committee subcommittee, Judge Dimock conceded that the government should implement a system for paying assigned counsel, but he objected strenuously to any system in

which full-time defenders were paid a salary that came from the federal government.

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While I believe . . . that the best way of dealing with the problem is by this privately supported defense organization, it can be dealt with on a case-by-case assignment basis very satisfactorily if some provision is made for compensation of the counsel so assigned . . . .

Indeed, in most localities they are getting along tolerably well by assignment on a case-by-case basis even when there is no provision for payment. But with the specialization of the bar, in simple fairness, provision must be made for the payment of these lawyers that we call upon over and over again to carry out an obligation which is really an obligation of the whole bar.

The privately supported defense organization is excellent, and the system for case-by-case assignment, if compensated, is reasonably good, but the public defender system, which would be permitted by the other three bills, is to me an abomination. It is bad law, and it is bad statesmanship.

It seems to me it becomes obvious that the public defender system is bad law as soon as we reflect on the fact that a criminal case is nothing but a lawsuit between two parties. One is the Government, and the other is the accused. And if a man does not agree with me when I tell him that the litigant whose lawyer owes his position and his livelihood to this opponent is at a disadvantage, I simply have no ground from which I can argue. . . .

The Supreme Court holds that the representation by counsel, the defense in criminal cases, is an absolute right, in the Federal courts in criminal cases. That means the American lawyer's traditional representation of his client, with an eye to the interests of that client only, that I have just described—the man who can afford privately retained counsel can obtain that right for himself, but the indigent defendant, who has a public defender foisted upon him, will be deprived of that right. . . .

There are some things, however, though, that we cannot turn over to the Government without the loss of our liberties. Is it not obvious that the last function that we should surrender to the Gov-



ernment is that of the defense against accusation of crime? . . . So with the public defender the accused would be represented by counsel retained and paid by the Government on a permanent basis. . . .

The ultimate in absolute power of a totalitarian government would be its control over the lawyers who ought to be representing those who have been accused as its enemies. If we take one step in that direction, will we not be faithless to the trust handed down to us by those who built this country, as a bulwark against tyranny?

I think that I ought to mention a provision in the Javits bill . . . [a]nd that is the provision for Government subsidy of bar associations and legal aid societies, when they undertake the defense of indigent defendants.

I think that the Government subsidy of these lawyers' organizations is a threat to the liberty of the accused. It is only one step removed from the public defenders system. In each of those systems, the Government that pays the piper can call the tune.

The payment of a lawyer on a case by case system constitutes no such threat, because he is only assigned occasionally, and he does not rely on those occasional assignments for his subsistence, and so he has the courage to vigorously oppose the government which pays him.

Another threat of that plan for the subsidy of these defense organizations is its threat to the independence of one of the primary functions of the bar. The bar associations are composed of lawyers. The legal aid societies are founded and managed by lawyers. In New York, the obligation of the bar to defend the indigent is performed by the instrument that the lawyers have set up for that purpose, the Legal Aid Society. The lawyers support it in very large part by their financial contributions, and insofar as they do not actually take the money out of their own pockets, they collect the money from the lay public.

Now, where a man's treasure is, there will his heart be also. And the fact that the lawyers are contributing these funds to these associations to a large part fosters the deep interest that they have in these institutions for carrying out their obligations which they support. And that is as it should be, because it is their obligation. But if these associations are subsidized by the Government, the lawyers will tend to lose interest, and again the defense of the indi-

gent will slip into the hands of the Government, which is the last place where it should be.

[Document Source: U.S. House of Representatives, Subcommittee No. 2 of the Committee on the Judiciary, *Hearings on H.R. 4185, H.R. 4609, and H.R. 6864, to Provide for the Representation of Indigent Defendants in Criminal Cases in the District Courts of the United States and H.R. 2271, to Amend Title 18 of the United States Code so as to Allow Compensation to Counsel Assigned by the Court in Criminal Cases*, 86th Cong., 1st sess., 1959, 39–43.]

### Allen Committee, Governmental Obligation to Provide Defense Counsel, Report of February 25, 1963

The 1959 House bills to create a public defender system were not reported out of committee, but the public defender proposal received new attention only two years later under the Kennedy administration. In 1961, Attorney General Robert F. Kennedy appointed the nine-person Committee on Poverty and the Administration of the Federal Criminal Justice System, chaired by Francis A. Allen, a law professor at the University of Michigan, and including Judge Walter Hoffman of the U.S. District Court for the Eastern District of Virginia.

In his State of the Union address in January 1963, President John F. Kennedy told Congress, “The right to competent counsel must be assured to every man accused of crime in federal court, regardless of his means.” The Allen Committee soon after issued its final report, which contained a host of proposals that ultimately were incorporated into the Criminal Justice Act of 1964.

At the heart of the Allen Committee report was the assertion that compensation for appointed defense counsel was not a matter of charity, but a fundamental obligation of the government. In contrast to Judge Dimock’s argument that control over paying defense counsel was a threat to the adversarial system and thus to liberty, Allen and his group emphasized that when the government initiated criminal proceedings, it was obligated to ensure that the adversarial system operated at its highest level and protected defendants from conviction based solely on lack of resources.

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Concern for the proper administration of criminal justice involves more than an expression of humanitarian sentiment or the extension of public charity. On the contrary, the Committee firmly believes that solution of the problem discussed in this Report

falls squarely within the area of governmental obligation. This is true because the requirements of just administration can never be regarded simply as matters of grace and because, in any event, much broader interests are affected than the welfare of the particular individuals proceeded against in the federal courts. . . .

The essential point is that the problems of poverty with which this Report is concerned arise in a process *initiated* by government for the achievement of basic governmental purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. Duties arise from action. When a course of conduct, however legitimate, entails the possibility of serious injury to persons, a duty on the actor to avoid the reasonably avoidable injuries is ordinarily recognized. When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.

The Committee, therefore, conceives the obligation of government less as an undertaking to eliminate "discrimination" against a class of accused persons and more as a broad commitment by government to rid its processes of all influences that tend to defeat the ends a system of justice is intended to serve. . . .

It is not only the interests of accused persons that require attention be given to the problems of poverty in criminal-law administration. Other and broader social interests are involved. We believe that the problems considered in this Report concern no less than the proper functioning of the rule of law in the criminal area and that, therefore, the interests and welfare of all citizens are in issue. American criminal procedure is accusatorial in nature and is founded upon the adversary system. It "presumes" the innocence of the accused. It requires the government to establish the guilt of the defendant beyond reasonable doubt. It imposes procedural regulations on the criminal process by constitutional command. In the modern era it is not always fully understood that

the adversary system performs a vital social function and is the product of long historical experience. . . .

The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system. We believe that the system is imperiled by the large numbers of accused persons unable to employ counsel or to meet even modest bail requirements and by the large, but indeterminate, numbers of persons, able to pay some part of the costs of defense, but unable to finance a full and proper defense. Persons suffering such disabilities are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss to the interests of accused individuals, occasioned by these failures, are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that the conditions produced by the financial incapacity of the accused are detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community.

[Document Source: *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice*, February 25, 1963, 9–11.]

Senator Sam J. Ervin, Jr., Necessity of Improved Representation for Indigent Defendants, *American Bar Association Journal*, May 1963

Senator Sam Ervin, a Democrat from North Carolina, was among the most outspoken supporters of the Department of Justice's 1963 criminal justice bill, which would have allowed the federal judicial districts to choose for themselves among several options: court ap-

pointment of private counsel, establishment of a public defender office, reliance upon local bar association and defender organizations, or some combination thereof. He had introduced similar legislation in the previous session, which passed the Senate but did not emerge from the House.

Ervin laid out his case for legislation in the American Bar Association Journal in May. In addition to arguing that the government needed a system to guarantee the substantive rights of the Sixth Amendment, Ervin pointed out the ways inadequate defense harmed the overall legitimacy of the criminal justice system. Ervin argued that defendants convicted because of poor representation and convictions overturned based on technical errors that may have been avoided by better defense counsel contributed to a loss of faith in the federal criminal courts.

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Society is not well protected when an accused is convicted due to inadequate representation and is thereby embittered over our legal process. When a prisoner is released from confinement, he is worth something to himself and society only if he returns with a desire to find his place, make proper adjustments and live a productive and useful life.

Until a prisoner's bitterness over an unfair legal process has been overcome, the correctional process will not work. If a poor prisoner leaves the courtroom with hate for a legal system because he rightly believes he has been defended inadequately, the chances for his rehabilitation are meager indeed.

Nor is society protected when defendants are released because of a technical error in the legal process. Law enforcement officers and prosecutors strongly prefer that adequate defense be available for persons accused of crime.

Chances are lessened for the overruling of convictions on error when adequate defense has been provided. In addition, most prosecutors prefer to enter the courtroom knowing that the conduct of trial will not be interrupted or prolonged by incompetent or unwilling defense counsel. Society and the defendant both are protected by the right to counsel as guaranteed in the Sixth Amendment. If a defendant is to take advantage of his legal rights, he must have competent counsel; in the federal system today, such

counsel is not guaranteed. The defendant's rights are useless to him if he does not know what they are or how to use them.

The wealthy defendant need never fear an inadequate defense. It is now up to Congress to eliminate that fear for the indigent. In these days when our nation is spending billions in aiding the poor of a multitude of other countries, when we are forced to spend more billions for national defense, I believe we can and must afford the cost to defend the basic rights of the poor here at home.

[Document Source: Sam J. Ervin, Jr., "Uncompensated Counsel: They Do Not Meet the Constitutional Mandate," *American Bar Association Journal* 49, no. 5 (May 1963): 438.]

Representative Byron G. Rogers, Opposition to Public Defender System, House of Representatives, Speech of January 15, 1964

Despite the swell of support for a bill to improve the system for providing counsel to indigent defendants, the Senate and House disagreed about the creation of public defender offices in the judicial districts. The Senate adopted a bill that included the option for large districts to create public defender offices, while the House, after contentious debate, passed a bill that omitted the public defender option. Instead, the House bill authorized districts to establish panels of attorneys available to represent indigent defendants and to compensate those attorneys. Alternatively, districts could elect to rely on established legal aid societies for this purpose.

In addition to the questions raised by Judge Dimock about government control over both sides of the adversarial process, some in Congress also feared the creation of a new, costly government bureaucracy. U.S. Representative Byron Rogers, a Democrat from Colorado, spoke in favor of the House version of the bill based on these financial concerns as well as his belief that public defender offices would diminish the role played by the bar and existing legal aid societies.

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The final grievous wrong with a Federal public defender system is that it will sooner or later smother the commendable legal assistance presently being rendered by private court-appointed attorneys, legal aid societies, bar associations, and local public defender organizations.

Today, there are in existence 92 legal aid and local public defender organizations supported by State and local funds. There are also 11 privately financed legal aid societies and 7 organizations financed by a combination of public and private funds. Sixteen States and the District of Columbia maintain these offices, including among others, the States of California, New York, and Tennessee where public defender offices have been proposed. In addition, many local bar associations, such as those of Los Angeles and San Francisco, have set up superbly working panels for providing counsel to indigent criminal defendants in Federal courts. This system of State or private assistance to the impoverished accused would slowly grind to a halt if the Federal public defender moved in. If anyone can cite an example where Federal bureaucracy has not driven out effective State and local self-help, then I shall be glad to reappraise my fear.

If we were faced with a situation where the local legal aid societies, local public defender organizations, and bar associations were not providing satisfactory representation, then there would exist a basis for filling the vacuum by creating the Office of Federal Public Defender. The exact opposite exists, however. Nothing but praise exists for the operations of the New York Legal Aid Society; the Voluntary Defender Association of Philadelphia; the Harvard Voluntary Defenders of Cambridge, Mass.; the Cincinnati and Cleveland, Ohio, legal aid associations; and many more.

In fact, the most surprising aspect of the House Judiciary Subcommittee hearings on this matter was that each witness who appeared before the subcommittee to testify in support of Federal public defenders indicated that they were only interested in the concept for someone else's district and not their own. The chairman of the Special Committee on Defense of Indigent Persons Accused of Crime, American Bar Association; the president of the Ohio Bar [Association]; the president of the American Bar Association; and the chairman of the Standing Committee on Legal Aid Work, American Bar Association, each in their turn, expressed support of the public defender system on the Federal level, but did not wish to see a defender office established in their respective districts—thereby damaging the vitality of their local organizations. When it was pointed out to some of these witnesses that a Federal defender office was intended for their district, the witness-

es expressed a hope that such an event would not occur. There have been statements made by those who support the Federal public defender system that privately appointed counsel have, at times, not rendered creditable service; that they have been too young or inexperienced; that they have not devoted sufficient time to their tasks; or that they have failed to present the best defense possible. In answer to these assertions, I say that the bar has been noteworthy in defending indigent accused and that the evidence of their outstanding work far outweighs the few instances of mediocrity. . . .

Finally, solely from the standpoint of maintaining a healthy independent bar in a healthy and independent society, responsibility must be accepted by members of the bar to aid those in need of help—thereby shouldering the burdens of democratic society.

[Document Source: *Congressional Record*, 88th Cong., 2nd sess., 1964, 110, pt. 1:446.]

Judge A. Sherman Christensen, Value of Uncompensated Representation, *American Bar Association Journal*, August 1965

While the potential establishment of federal public defender offices was controversial, widespread support existed for compensating attorneys appointed to represent indigent criminal defendants in federal court. Still, there were some who objected to any government involvement whatsoever in what had up to then been considered a public service of the bar.

Shortly after the passage of the Criminal Justice Act of 1964, which authorized attorney compensation, Judge A. Sherman Christensen of the U.S. District Court for the District of Utah lamented the passing of what he saw as the public service component of representing indigent clients.

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Until recently it has been accepted that an attorney as an officer of the court, like other officers, takes his office cum onere. One of the “burdens of office” with the force of long standing and willing observance is the gratuitous service rendered poor persons at the suggestion or appointment of the court.

As concrete evidence of their commitment to the spirit of liberty under constitutional government, lawyers for centuries justly



have counted their gratuitous representation of indigent defendants charged with crime as one of their greatest public contributions and proudest boasts. . . .

At least partly because of this tradition, lawyers have claimed a monopoly of the right to charge compensation for legal services to others. This was, and continues to be, in the public interest, for there are no more poorly advised or expensively represented persons in legal affairs than those advised or represented by nonlawyers. Yet a concomitant of great privilege, in the nature of things, must be heavy responsibility.

Through this willingness the prestige of the legal profession has been maintained, despite eroding influences. Based upon its implemented faith, the Bar effectively has met charges that it is engaged in only a "business" or "trade" by pointing to its altruistic service under this commitment, to its code of ethics and to the lawyer's oath. The system of court-appointed defense counsel, serving without fees has been responsible for much of the progress that has been made in the recognition and protection of the rights of those accused of crime. . . . It has resulted in decisions of great constitutional and social importance, born not of narrow or merely mercenary interests but from the broad concern of dedicated lawyers interested primarily in principle. . . .

In the last few years this great tradition has withered; this wholehearted commitment has faded away. Increasing numbers of attorneys have become preoccupied with being paid, even for compassionate services. They are struck with the thought that they can be charitable and compensated at the same time, or enamored of the idea that compensated or not, limited panels of other hired counsel or public defenders might relieve them of the unprofitable bother of it all. In state after state the responsibility of the Bar as a whole thus has been narrowed or vacated. This has concentrated among relatively few the opportunities and responsibilities for meaningful participation in the administration of the criminal law. . . .

By the Criminal Justice Act of 1964, Congress has provided for the payment by the Federal Government in limited amounts of fees as well as expenses of attorneys representing indigent criminal defendants in federal courts. . . .

Fees can never take the place of the traditional commitments of members of the legal profession to the cause of justice under law. The most glaring examples of inadequate representation which have come to my attention during the more than ten years that I have served on the bench have been on the part of paid counsel specializing in criminal law, for whom criminal cases represented a rather ordinary affair. Some of the most effective representation has been by assigned counsel with little or no prior experience in criminal cases, operating entirely without fee and at their own expense. . . .

As against intangible individual and professional rewards, money compensation in most cases will not be of too great importance. No one can expect to become affluent from assigned cases; any individual benefit will be inconsequential. Under sound systems of rotated assignments, the responsibility of representation in criminal cases would be spread and likely would fall on any individual attorney no more than once a year. In the United States District Court for the District of Utah it arises for an individual attorney on an average of once every two years.

It is estimated that under the Criminal Justice Act of 1964 the average payment in fees to an attorney assigned to represent an indigent will be \$175. Payment in any one case cannot exceed \$500. For these relatively modest amounts members of the legal profession should not be willing to abandon any substantial part of the profession's prestige or position.

[Document Source: A. Sherman Christensen, "Requiem for an Abandoned Commitment," *American Bar Association Journal* 51, no. 8 (August 1965): 741–743.]

Terence F. MacCarthy, Support for District Choice of Defender System, Testimony Before Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, June 24, 1969

When the House and Senate reached agreement on the final version of the Criminal Justice Act of 1964, the conference report presenting the bill recommended that the executive and judicial branches study its operation in the near future and consider once again the question of full-time public defenders.

In 1967, the Judicial Conference and the Department of Justice commissioned a study of the CJA led by Dallin H. Oaks of the

University of Chicago Law School. The Oaks Committee report recommended that Congress adopt a “mixed system” that incorporated public defenders, private attorney panels, and private community defender organizations.<sup>46</sup> Since 1964, a number of districts had created new private defender organizations staffed with attorneys whose salaries came mostly from private donations, with the organization receiving case-by-case compensation under the CJA.

A new bill to amend the CJA, which became law in 1970, implemented Oaks’ mixed system by allowing a district (or adjoining districts) that had 200 indigent defendants a year to create a “defender organization.” That organization could be a federal public defender organization—consisting of full-time salaried employees of the judiciary appointed by the judicial council—or a community defender organization, which would be a private, nonprofit defense counsel service established by the bar and funded by periodic federal grants.

Terence F. MacCarthy of the Northern District of Illinois’ Federal Defender Program testified in favor of the bill’s mixed system. He urged members of Congress to shelve the debate on congressional creation of public defender offices and to allow the districts to create the defender organizations of their choosing. Only experience with different defender systems, MacCarthy asserted, would bear out whether panels, private organizations, or public defenders would be most effective.

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I respectfully urge to this Committee the suggestion that the proposed Amendments are not only a significant improvement on the Criminal Justice Act of 1964, but I would and do go further in representing that passage of the proposed Amendments is now totally necessary. . . .

My observations are necessarily premised upon a belief that organized defender services are an improvement over the alternative ad hoc appointment of counsel. By organized defender services I am not limiting myself to public defender offices, but rather, have a more generic reference which includes public, private or private-public systems operated on either a defender or

46. Dallin H. Oaks, *The Criminal Justice Act in the Federal District Courts* (1967) (printed by U.S. Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 90th Cong., 2nd sess. (1969)).

assigned counsel system, or a combination of both. A defender system thus, as I use the term, implies a central coordination organization, distinguished from the court itself, responsible for the systematic providing of adequate defender services. The adjective adequate implies the organization's right and responsibility to advise and assist its defender attorneys as well as have a voice in their selection and retention.

In emphasizing the need for immediate assistance I am not unmindful of the as yet unresolved question as to the relative merits of a public defender as compared with an assigned counsel system. However, I respectfully suggest that; (1) we cannot, in consideration of the immediate need, indulge ourselves the luxury of awaiting a determination of this issue; (2) a more meaningful resolution of this issue is contemplated and will be obtained if S. 1461 is passed in that public defender and various assigned counsel systems (as well as "mixed" systems) will exist contemporaneously permitting their respective operations to be subject to comparison . . . .

Most importantly, however, regardless of the defender organization adopted, some courts can be expected to adopt a "mixed" system which will provide both central administration through full-time defenders, while at the same time retaining systematic appointments to qualified members of the bar. On the basis of my own experience and my knowledge of the operation of our program and programs in other districts I feel strongly that the contemplated "mixed" system, where the central administration derives from a public defender or community defender organization, will prove to be the best means available for providing defender services. "Mixed" or hybrid defender systems would incorporate the advantages while at the same time substantially eliminate the disadvantages of both the public defender and assigned counsel systems. Assuming the accuracy of this conclusion the controversy between the relative merits of public defender or assigned counsel systems need not be determined. . . .

Although for centuries lawyers have historically been inculcated with a professional tradition dictating an obligation to represent the legally indigent, a tradition set forth in our Canons of Ethics, the unfortunate circumstance presently exists and will persist that most attorneys no longer have the ability, time or the de-

sire to participate in criminal cases. The lowly state of the criminal practitioner buttressed by the ever increasing specialization and required expertise involved in representing criminal defendants has assisted in the creation of the present vacuum. Those attorneys who may have the desire, unfortunately, usually do not have the ability. The situation can only be redeemed and remedied by creating legal defender organizations which in turn would encourage and assist those lawyers who do represent the legally indigent.

[Document Source: U.S. Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Hearings on S. 1461, Amendments to the Criminal Justice Act of 1964*, 91st Cong., 1st sess., 1969, 122–124.]

## *Detention Before Trial and Conviction*

In the 1960s, both congressional legislation and judicial decisions reflected a greater concern for the rights of criminal defendants. Supreme Court rulings such as *Gideon v. Wainwright*, concerning the right to counsel for indigent criminal defendants in state courts, and *Miranda v. Arizona*, which required the police to advise an arrestee prior to interrogation of the right to remain silent and the right to counsel, exemplified this trend.

In the legislative realm, policymakers confronted the treatment of individuals charged with a crime and awaiting trial. The earliest discussions centered on the unfairness of the bail system, which allowed those with sufficient financial resources to go free pending trial while poor defendants unable to make bail remained behind bars. In response to entreaties that the justice system should treat all defendants equally regardless of their financial means, Congress in 1966 enacted a bail reform statute that made release on one's own recognizance the default practice and included conditions of release other than the posting of cash bail.<sup>47</sup> The reform met with little opposition, as it was supported by virtually all interested parties other than those in the bail bond industry.

While relatively uncontroversial at the time it was passed, bail reform led to more defendants being released while awaiting trial—as it was designed to do—and thereby sparked a debate over preventive

47. Bail Reform Act of 1966, 80 Stat. 214 (1966).

detention, or the practice of keeping a criminal defendant in jail prior to trial based on the belief that the individual would pose a danger to society if released. Advocates of preventive detention wished to allow judges to consider a defendant's potential dangerousness in setting bail or to withhold bail completely and keep the defendant incarcerated. Opponents believed that preventive detention contravened the presumption of innocence central to the American system of justice.

The legislative effort to enact preventive detention failed in the early 1970s, and focus shifted instead to an act requiring speedier trials as an alternative that would result in less time out on release for criminal defendants. Some supported the measure because they felt it would make the justice system operate more efficiently and serve to reduce crime by getting the guilty behind bars more quickly. Others focused on the fact that such legislation would vindicate a defendant's Sixth Amendment right to a speedy trial, which was not being sufficiently enforced. The most controversial aspect of the proposed law was a provision requiring that charges be dismissed with prejudice—meaning that the government would be barred from refiling them—if an accused was not tried in a timely fashion. Proponents felt such a provision was necessary to give the law teeth, while others believed that it would result in the freeing of dangerous criminals—in some cases due to a lack of sufficient judicial resources rather than any fault of the prosecution. The Speedy Trial Act that passed in 1974 provided that the dismissal provisions would not go into effect for five years and gave judges the discretion to dismiss charges with or without prejudice depending on the circumstances.

By the early 1980s, nearly half of the states had enacted some sort of preventive detention measure, and the subject was raised again during discussions of criminal justice reform in Congress. With a new emphasis on “getting tough on crime,” there was bipartisan support for such a measure, based on the belief that the safety of the community was a legitimate factor for a judge to consider as part of the bail process. Supporters of preventive detention pointed out that judges were already setting high bail based on a defendant's potential dangerousness, and that bringing the practice out into the open would result in greater protection of defendants' rights. The Bail Reform Act of 1984, passed as part of a comprehensive crime bill, allowed federal judges to consider the potential dangerousness of individuals charged with particular violent crimes and to withhold bail entirely if they

deemed it necessary. The Act was the last major change to the federal system of pretrial detention.

## *Bail Reform Act of 1966*

An important aspect of policymakers' focus on poverty in the 1960s was their attempt to understand how economic inequality affected the experiences of those caught up in the nation's criminal justice system. One of the most significant issues in that regard was the federal courts' system of bail and pretrial release of criminal defendants.

In the federal courts, as in most state courts, a defendant charged with a crime could be released pending trial if he or she deposited with the court the amount of cash bail set by the judge. Most defendants did not have enough money or property to raise the funds necessary to meet bail and thus depended on the services of bail bondsmen, who secured a defendant's return for trial in return for a fee paid by the defendant. If a defendant failed to appear for trial, the bail bondsman would be responsible for paying to the court the full amount of the bail. Bail bondsmen therefore wielded great influence over whether a defendant would be released before trial. If the bondsman declined to provide his services, or the defendant could not afford the fee, then the defendant would remain in jail pending trial.

Beginning in the 1950s, social scientists, philanthropists, and government agencies began to study the operation and impact of the bail system in state and federal courts. Caleb Foote of the University of Pennsylvania Law School pioneered the study of bail systems in Philadelphia<sup>48</sup> and New York,<sup>49</sup> and similar studies followed in other major cities. The philanthropic Vera Foundation launched the Manhattan Bail Project, which encouraged judges to release defendants on their own recognizance, that is, without requiring bail. Attorney General Robert F. Kennedy's Committee on Poverty and the Administration of Federal Criminal Justice, chaired by Frances Allen, examined bail practices in federal court as well.

According to these studies, the nation's bail system was broken and in need of major reform. While formally bail was a tool for ensur-

48. "Compelling Appearance in Court: Administration of Bail in Philadelphia," *University of Pennsylvania Law Review* 102, no. 8 (June 1954): 1031–1079.

49. "A Study of the Administration of Bail in New York City," *University of Pennsylvania Law Review* 106, no. 5 (March 1958): 693–730.

ing that released defendants would appear at trial, investigators found that judges were using bail to keep in jail defendants they perceived as a threat to the community. In fact, up to two-thirds of defendants with bail set at \$1,000 were unable to make bail and thus remained incarcerated prior to trial. Bail reform advocates asserted that defendants who were unable to obtain release fared worse at trial than those who were released, because it was more difficult for them to meet with counsel and plan a defense. Moreover, defendants unable to secure bail often lost their jobs while in custody. Bail practices were inconsistent from one federal district to another, and the Allen Committee reached “the inescapable conclusion” that bail and release practice “proceeds in the federal district courts with little or no reference to any national policy.”<sup>50</sup>

In 1964, Senator Sam Ervin, a Democrat from North Carolina, took the lead on reform of bail practices in the federal court system. He proposed a series of bills to make release on one’s own recognizance the presumptive option for judges and, where possible, to set conditions for pretrial release that were tailored to the circumstances of individual defendants and did not necessarily involve cash bail.

The vast majority of those interested in the federal bail system—judges, lawyers, scholars, and members of Congress—agreed that the existing system was unfair, particularly to the poor, and that reform was needed. The only constituency that argued against major reform was the bail bond industry, the members of which correctly perceived a movement away from cash bail as a threat to their commercial interests. As a result of this broad consensus, most of the debate surrounding bail concerned the details, rather than the overall goals, of the new policy. The Bail Reform Act of 1966 had as its stated purpose to “assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest.” The Act made release on one’s own recognizance the default procedure and mandated that defendants be released under the minimum conditions reasonably required to ensure their presence at trial, providing bail alternatives such as pretrial supervision by a designated person or organization and restrictions on travel.

50. *Report of the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice* (February 25, 1963), 75.



Senator Roman L. Hruska, Unfairness of Bail System,  
Testimony Before Senate Subcommittees on Constitutional  
Rights and on Improvements in Judicial Machinery of the  
Committee on the Judiciary, August 4, 1964

Senator Roman Hruska, a Republican from Nebraska and an influential member of the Senate Judiciary Committee, argued the case for bail reform at the start of committee hearings in 1964. He asserted that judges set bail at levels designed to keep defendants in jail, in direct contradiction to the very purpose of bail. Hruska criticized the existing bail system as punitive toward the poor and a threat to equality before the law.

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[A] person's financial status must be irrelevant in the administration of criminal justice. The prevalent practices with bail, however, have long pointed up the need for new procedures. The acceptable purpose of bail recognized by our Founding Fathers when they provided in the eighth amendment of the Constitution that excessive bail shall not be required, is now an indispensable attribute of our system of criminal justice. It is well documented, nonetheless, that this constitutional precept has malfunctioned in our modern society.

Justice is depicted as being blind when balancing the scales of justice. However, in the area of bail, wealth versus poverty has been substituted on the scales for innocence versus guilt. Bail is made available, not on the basis of the innocence of the accused or the protection of society, but almost solely on the basis of financial resources. Pretrial release goes to those who can buy it. The specter of detention remains to haunt the poor. . . .

Of late, there has been much talk about tackling the problems of poverty. Reform of the existing bail practices would, in fact, represent a positive effort toward overcoming one of its worst aspects—that in the area of pretrial detention poverty is a punishable crime. Reforms of the kind now under consideration would serve to enforce the guarantee that is the birthright of all, rich or poor: equal justice before the law.

[Document Source: U.S. Senate, Subcommittees on Constitutional Rights and on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2838, S. 2839, and S. 2840, Bills to Improve Federal Bail Procedures*, 88th Cong., 2nd sess., 1964, 19.]

Charles H. Bowman, Support for Elimination of Bail Bonds,  
Testimony Before Senate Subcommittees on Constitutional  
Rights and on Improvements in Judicial Machinery of the  
Committee on the Judiciary, August 6, 1964

Among the many criticisms of the bail system was the outsized role that bail bondsmen played in determining whether a defendant could secure pretrial release. Some proposed that bail bonds be replaced by allowing defendants not released on their own recognizance to pay 10 percent of the bail amount directly to the court.

Charles Bowman, a criminal law expert at the University of Illinois College of Law, testified in favor of this reform before two subcommittees of the Senate Judiciary Committee. He referred to the fees collected by bail bondsmen as “fees for liberty,” arguing that Congress ought to eliminate the role of bail bondsmen in making pretrial detention determinations and thereby place more power in the hands of judges.

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Bail in the United States today is a multibillion dollar industry. It is reported . . . that from 1956 to 1958 one insurance company, in the city of New York, wrote bail bonds in the face amount of \$70,000,000, received \$1,400,000 in surety premiums, and suffered no losses. This, in dollars and cents, represents the monetary price paid by only a comparatively small portion of our citizens for liberty, for freedom from jail detention before they were even tried for the offenses for which they were arrested. The billions of dollars collected by the insurance companies and private professional bail bondsmen in this country as fees for liberty do not represent fines imposed by, and collected for the benefit of, society upon individuals tried and convicted of crimes against society. Instead, they represent the profits of private individuals who are permitted [*sic*] by our State and Federal Governments to participate in the administration-of-justice process solely for their personal profit, without being elected, appointed, or responsible as public officers or employees. The extent to which we have abdicated our legislative, judicial, and legally professional responsibilities in the administration of criminal justice to these private, profit-motivated individuals is a national disgrace.

Please do not misunderstand me: I am strongly and passionately in favor of our private enterprise system in this country, and throughout the world—but not as a dominant feature of our government system of justice. I am even less enamored of such practices when such huge fees must be paid to private individuals as the price of liberty before the person paying them is tried and convicted in a duly constituted court of law. It is foreign to every other fundamental concept of justice which we treasure in this country.

The present system of bail has been developed and controlled primarily by the professional bondsmen. It is to their monetary interest to do so. And our courts, legislatures, law enforcement officials, and the legal profession have permitted them to control it. The basic question as I see it is: What can we do to restore the administration of bail and the control of pretrial custody or release, to the courts—where it belongs? . . .

[I]f all the facts and circumstances of a particular case indicate that the arrestee will not flee, but will appear as required, why should he have to pay any fee for his liberty before he is legally tried and convicted?

[Document Source: U.S. Senate, Subcommittees on Constitutional Rights and on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2838, S. 2839, and S. 2840, Bills to Improve Federal Bail Procedures*, 88th Cong., 2nd sess., 1964, 162.]

George L. Will, Necessity of Bail Bond System, Testimony Before Senate Subcommittees on Constitutional Rights and on Improvements in Judicial Machinery of the Committee on the Judiciary, August 4, 1964

Representatives of the bail bond industry objected to being characterized as contributing to injustice for poor defendants. George L. Will, executive director of the American Society of Professional Bail Bondsmen, argued before Congress that bail bondsmen provided a service that was integral to the criminal justice system by facilitating the release of those defendants who were “good risks,” that is, likely to return for trial. Indigent defendants were less likely to make bail, but Will argued that this was not only because of their financial condition but also because they were the riskiest group of defendants to insure. Will asserted that reform proposals to allow defendants to pay a nominal deposit directly to the court represented an attack

on free enterprise and threatened public safety by allowing the indiscriminate release of defendants without regard to their potential dangerousness or risk of flight.

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Bail bondsmen have been in the insurance business for over 100 years. They more than anyone else have “insured” that the American citizen receives “equal justice under the law” by his enforced attendance in the courts to answer the charges placed against him.

The bail bond system is the very foundation of justice because if those released on bond did not appear in court, the machinery of justice would break down. It is the task of the bondsmen to release “good risks” citizens so that while they are free on bond they may prepare their cases, support their family, and continue their normal way of life pending trial. . . .

It has been charged that thousands of citizens are in jail because they cannot buy their release. We charge that this statement is a lie. The bail bond business is so highly competitive that any person who is a “good risk” is released on bond. Only the bad risks remain in jail.

They charge that only the wealthy can afford to buy their freedom and that we discriminate against the “poor indigent.” This is a lie. Certainly the financial condition of the defendant is an important qualification for bond. But the facts and records prove that the majority of bailees are in the middle income bracket. It is unfortunate but true (the bondsmen have found out from bitter experience) that the “poor indigent” is the poorest risk and that is why he remains in jail pending trial.

They cite in magazine articles and in the Readers Digest . . . the case of a “poor indigent” who though later proved to be innocent languished in jail for months because the bondsmen refused to underwrite his bail. However, it is not the bail bondsmen who hold these “poor indigents” in jail awaiting trial but it is the courts who violate his constitutional rights by denying him a speedy trial. The courts only have to initiate a system of immediate trial for indigents giving them preference over those released on bond. . . .

It is charged that bondsmen associate with thieves and crooks, it is unfortunate but true as we do not receive our business from priests and bishops. However, because three apples in a barrel are bad you do not condemn the whole barrel. The average bondsman is a homeowner, taxpayer, family businessman who operates his business in a professional manner.

Under the provisions of S. 2840 they would have the U.S. Government operate as a bonding company. They would release anyone by the deposit of 10 percent of the bond with the court.

It is obvious that neither Mr. Bennett [of the U.S. Bureau of Prisons] nor quite a few people have read S. 2840, because under those provisions, under that system, thieves, crooks, sexual perverts, prostitutes, counterfeiters, spies, bank robbers, rapists, and kidnappers would be released without supervision or control to prey upon the public again merely by the deposit of 10 percent of the bond. . . .

Under provisions of bill S. 2838 they would release good risk indigents in their own recognizance without bond. We charge that there is no such person as a good risk indigent. The qualifications for bond are the same for everyone and certainly if a man although indigent has family and friends he will be able to raise the bail bond premium. Less than 10 percent of all bail bonds written have any type of cash collateral to back up the bond.

We believe this attack upon the foundation of justice is indicative of a great change in the social policies of our Government. We regret using clichés, but sometimes they are the only way to definitize a philosophy of government; namely, from the cradle to the grave. Under this role the Government assumes the role of God and is omnipotent. Under this role the citizen is guaranteed employment, free medical care, free legal counsel, free release from jail. All of these free programs are totally foreign to the original concept of government as practiced by our forefathers. It is ironic that these free release systems have been financed by tax-free foundations whose basic wealth was originated by men who believed and made their fortunes under our free enterprise economic system. The very personal and individualistic traits that made these men millionaires are being used to destroy our way of life and beliefs that have made this country the strongest and wealthiest on the earth.

The question is: Who will control the keys to the jail? The independent businessman or the social parasite who infiltrates the government and lives off the fruits of another's labor and business. If they successfully attack our system of justice by seizing the keys to the jail under the smokescreen of helping the indigent they will have a tremendous political advantage to foster their sociological changes in our Government.

[Document Source: U.S. Senate, Subcommittees on Constitutional Rights and on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2838, S. 2839, and S. 2840, Bills to Improve Federal Bail Procedures*, 88th Cong., 2nd sess., 1964, 79–80.]

Jack T. Conway, Excessive Burden of Bail System on the Poor, Testimony Before Senate Subcommittees on Constitutional Rights and on Improvements in Judicial Machinery of the Committee on the Judiciary, June 16, 1965

In 1964, President Lyndon Johnson announced his War on Poverty and the creation of the Office of Economic Opportunity (OEO). In congressional testimony on a 1965 bail reform bill, OEO deputy director Jack T. Conway pointed out that the existing bail system was burdensome for the poor but also exacerbated the problems of poverty, as individuals who could not make even low bail suffered losses of jobs and income and were more likely to be convicted than those released before trial.

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Present bail practice affects the poor in several different ways. Thirty-five million “hard-core” poor, one-fifth of our Nation, live on family incomes of less than \$60 a week. The minimum bail set is usually \$500 requiring a \$50 or \$75 premium for securing bond from a professional bail bondsman and bail of \$2,500 or \$5,000 is not infrequent. Consequently, the poor generally cannot make bail. When the accused later turns out to be innocent, this means days, weeks, and sometimes months behind bars before trial. . . .

Moreover, prior detention hobbles adequate preparation for trial. The accused is unable to assist in tracking down evidentiary leads. He is unable to assist in assembling witnesses. The result is that a man forced to stay in jail before trial is more likely to be con-

victed. If convicted, he is more likely to get a jail term rather than suspended sentence. And if sentenced to a jail term, he is likely to get a longer sentence. Thus, the present bail system results in unfairness in the administration of justice. What is more, it actually contributes to poverty.

First, the present bail system is economically harmful. When a person of very small means can post bond, this usually is done by borrowing at exorbitant interest rates and cutting deeply into an already marginal standard of living.

When he cannot post bond, the accused generally loses his job; his car, if he has one, and other essential belongings are repossessed; and his credit is destroyed. He is stripped of these vital necessities of life and employment even if he is later freed or given a suspended sentence. The effect of his loss is multiplied if he is ultimately sentenced to imprisonment—and sentence may well result just because a man was in jail prior to trial.

On the other hand, the enactment of this legislation will permit the courts to allow a significant number of the poor to retain their jobs and their ability to contribute to the support of their families. . . .

Incarceration based solely upon financial considerations permanently alienates the poor from the law, and from the institutions of the larger society. The poor generally tend to view the law as an instrument which society uses to suppress them. Welfare agencies often withhold money; the police arrest him; and the courts are used to evict him from his home and to garnishee his wages. Current bail practices reinforce the attitude of the poor that the law is his enemy. . . .

The proposed legislation wisely restores a legal right of the defendant without money and redresses the wrong which he suffers from an unjustified jail sentence simply because he is poor.

[Document Source: U.S. Senate, Subcommittees on Constitutional Rights and on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 1357, S. 646, S. 647, and S. 648, Proposals to Modify Federal Bail Procedures*, 89th Cong., 1st sess., 1965, 85–86.]

## *Preventive Detention*

Soon after Congress passed the Bail Reform Act of 1966, the focus of the debate over the bail system shifted. While critics had pointed out that judges often used bail to keep defendants locked up prior to trial, an increase in crime rates by the end of the decade led some elected officials to believe that this was a necessary practice rather than an injustice.

Beginning in 1969, some members of Congress proposed that judges be authorized to order preventive detention—the withholding of bail for defendants they deemed to be a threat to the community. A major motivating factor behind the push for preventive detention was the deteriorating situation in the District of Columbia, which was facing a rapid rise in crime and a backlog of cases awaiting trial. With the advent of paid counsel for indigent defendants, fewer were pleading guilty, leading to more trials. Critics of the 1966 bail reforms argued that more defendants were on the street awaiting trial for longer periods of time, increasing the risk to the public.

Preventive detention was proposed but rejected during debate over the Bail Reform Act of 1966. Later that year, President Johnson's Commission on Crime in the District of Columbia issued a report that highlighted growing concern over crimes committed by defendants on pretrial release. The commission was split on preventive detention, but the majority favored it. The following year, a committee of the District of Columbia Judicial Council, chaired by U.S. District Judge George L. Hart, Jr., studied the operation of the 1966 bail reforms, and in May 1969, six of the eleven members of the Hart Committee called for a preventive detention measure.

President Richard Nixon publicly advocated preventive detention in January 1969, and the Department of Justice drafted a proposed bill later that year. In 1969 and again in 1970, the Senate Judiciary Committee's Subcommittee on Constitutional Rights, chaired by Sam Ervin, held hearings on the issue, but Ervin himself firmly disapproved of such a policy change. Meanwhile, the Department of Justice successfully had preventive detention provisions incorporated into the D.C. Court Reform and Criminal Procedure Act of 1970, which established the District of Columbia Superior Court and gave it jurisdiction over all local criminal offenses.<sup>51</sup>

51. District of Columbia Court Reform and Criminal Procedure Act of 1970, 84



Proposals for preventive detention raised a host of constitutional questions. Supporters of the practice argued that the Eighth Amendment's prohibition of "excessive bail" did not act as a bar to the withholding of bail.<sup>52</sup> Opponents of preventive detention objected to giving judges the power to remand individuals to jail based on unreliable predictions about future behavior, a practice that they believed threatened the presumption of innocence to which all defendants were entitled. Ultimately, Congress rejected preventive detention in favor of measures aimed at encouraging prosecutors and courts to get defendants to trial more quickly—an effort that culminated with the Speedy Trial Act of 1974.

Senator Robert C. Byrd, Support for Preventive Detention,  
Testimony Before Senate Subcommittee on Constitutional  
Rights of the Committee on the Judiciary, February 4, 1969

Amidst a climate of urban riots and antiwar protests, Richard Nixon campaigned for the presidency in 1968 on a call for law and order. Among his earliest proposals as president was one to grant judges the authority to order the pretrial detention, without bail, of defendants deemed to be a threat to the community. In July 1969, the Department of Justice submitted a bill to Congress to amend the 1966 Bail Reform Act and legalize preventive detention, as well as to establish greater penalties for bail jumping and for crimes committed by those out on pretrial release.

Senator Robert Byrd, a Democrat from West Virginia, was one of the strongest advocates for preventive detention. As chair of the Senate subcommittee responsible for appropriations for the District of Columbia, Byrd heard testimony in early 1969 outlining the challenges of rising crime rates and the lack of resources to handle the growing number of trials. As a result, Byrd was determined to attack the sources of increased crime, one of which he believed to be the recent bail reform.

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[T]he comparatively new Bail Reform Act of 1966—particularly as it has been operating in conjunction with the also relatively

Stat. 473 (1970).

52. In 1987, the Supreme Court ruled that preventive detention did not violate the Eighth Amendment, finding that the excessive bail clause did not guarantee the availability of bail. *U.S. v. Salerno*, 481 U.S. 739 (1987).

new Criminal Justice Act—gives an insupportable advantage to the criminal who makes a business of violent and serious crime. It places the victims of such crimes—and the public—unfairly at the mercy of such criminals, and it places a tremendous and unnecessary additional burden on already overburdened courts and related law enforcement agencies to a point which threatens a breakdown of the whole Federal law enforcement system.

In proposing these amendments, I wish to make it clear that, generally, I am in accord with the objectives of the Bail Reform Act . . . . I am also quite mindful of the fact that the Bail Reform Act of 1966, or the manner in which it has been operating, is certainly not the sole reason for the sharply rising crime rate and the increase in lawlessness. But, when under the 1966 Bail Reform Act—regardless of the gravity and circumstances of the crime, the weight of the evidence, or the past history and dangerous character of the accused—the arraigning magistrate is forced to regularly release back to the streets, on nominal or relatively low bail or on personal recognizance or other seemingly ineffective conditions, perpetrators of the most vicious crimes, to continue preying on the public until trial—often at some far future date—because the prime consideration in setting the amount of bail has become the defendant's visible ability to make the bond then I believe it is time to amend the law and without further delay. . . . I feel that the law, as it now stands, may be of more benefit to the habitual criminal than it is to those for whom it was designed, and that it is turning into something of a catastrophe for the victims of this criminal element and the law-abiding public. . . .

It would appear that the evidence piling up has become conclusive that the social service approach to handling hardened violent criminal offenders will not work and that regardless of the number of judges appointed and other law enforcement personnel employed, rising violent crime cannot be controlled without amendment of the law to give the courts discretion, upon arraignment, to consider the danger the accused poses to the community. The situation has become similar to a contagion which has raged out of control with no preventive serum as yet developed to check it. . . .

We now have had enough experience under the Bail Reform Act to know that it is not working in the manner in which it was

hoped, and that the manner in which it is operating has a direct bearing upon the sharp rise in crime and the increase in lawlessness, and there is now ample proof, in my judgment, that it needs to be changed. As I have pointed out, the principal reason it is not working is that the Federal statutory law requires that chronic violent criminals who have shown a high probability of danger to society must be released on low bond or personal recognizance because the only yardstick the statute permits in setting bail or other conditions of release is the danger of flight. Yet, when it is proposed that the statutory law be amended to permit consideration of the danger which such violent offenders pose to society, a confusion of voices is raised protesting that to consider anything other than flight of the accused on pretrial release is unconstitutional; that it violates the traditional presumption of innocence that it is punishment before conviction; that it is impossible to predict that an accused will commit another crime if released; that it violates the constitutional right of "due process," and so forth. . . .

In the matter of due process, the interests of society must be balanced against the liberties of the individual, and restrictions and conditions imposed must be matched with the need to impose them. Nor can a ruling to detain, or to fix other conditions of release of an accused based on the danger he poses to society, be arbitrary, or not based on the gravity of the crime, the weight of the evidence, and other circumstances of the particular case. Any defendant is entitled to all of the legal safeguards constituting due process, including a hearing at the time of his arraignment, or a special hearing, so that all appropriate facts may be presented. If, based on the facts, the judge in the exercise of his discretion determines that the defendant should be detained, or sets reasonable bail which the defendant is unable to make, he has the right to appeal such a ruling and certainly he has a right to a speedy trial.

[Document Source: U.S. Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Hearings on Amendments to the Bail Reform Act of 1966*, 91st Cong., 1st sess., 1969, 308–309, 321–323.]

Abraham S. Goldstein, Opposition to Preventive Detention, *The New Republic*, March 8, 1969

Preventive detention was not a popular proposal among the nation's law professoriate. Abraham Goldstein, a professor (and later, dean) of Yale Law School and a criminal justice expert, spoke out against the policy in 1969. Goldstein argued that accurate prediction of a defendant's dangerousness was almost impossible. Further, he feared that legitimizing preventive detention—which, he pointed out, was already being achieved through high bail—would erode the right to a speedy trial as well as the presumption of innocence.

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Preventive detention before trial has long been formally recognized in European countries, including England. And it exists in fact, if not in law, in the United States as courts regularly set bail in amounts deliberately calculated to keep in custody persons who are regarded as dangerous, or persons who are thought to deserve punishment but are unlikely to be convicted. Indeed, the practice has been so widespread that fewer persons are released on bail in most of our states, where there is nominally an absolute right to bail, than in England where there is no such right. The current proposals would take this practice of preventive detention out of an illegitimate twilight zone and make it a regular part of the criminal process. . . .

The Nixon proposal is especially offensive because it uses words and phrases—like “hardcore recidivists” and “clear danger to the community” as if they really had content directly relevant to the questions of prediction inherent in preventive detention. It is impossible to say with much assurance who will commit a crime in the future; it is even less possible to say who will commit a crime within the limited period a defendant is awaiting trial, particularly if he is hedged about with restrictions as to what he may do and where he may go and if he is brought on for trial expeditiously. . . .

Perhaps the most important point to be made against the proposal is that the principle of pretrial preventive detention, once legitimated, is likely to develop a life of its own. More and more crimes will be regarded as sufficiently threatening to warrant detention before trial. This will do irreparable harm to the presumption of innocence and to the more concrete interests described earlier. It will, in addition, add materially to already clogged court

calendars and an overburdened judicial system as new procedures are created to determine the issue of probable danger and new provisions for appellate review are devised to make preventive detention more palatable. Over time, the result may well be more trial delays, more extended pretrial detention, and, eventually, as some of the proposals contemplate, a requirement of release if the trial is not held within the stated period of time. This may lead, in turn, to a condition I have observed in at least one Latin-American country: trials rarely held and preventive detention an entire substitute for post-conviction imprisonment.

The criminal law has always had to take into account that the restrictions we place on state power may cost us some measure of protection from danger. In the effort to avoid all danger, the proponents of preventive detention exaggerate what can be predicted about criminality to justify an indiscriminate practice of imprisoning persons whose guilt remains to be proved. Such a course would sacrifice too casually the liberty of too many people for a negligible increase in public safety. Worse, it may delude us into thinking something substantial is being done to reduce crime.

[Document Source: Abraham S. Goldstein, "Jail Before Trial," *The New Republic*, March 8, 1969, 15–17.]

### Attorney General John N. Mitchell, Constitutionality of Preventive Detention, *Virginia Law Review*, November 1969

Proposals for preventive detention attracted support from elected officials eager to address rising crime rates, but drew criticism from some quarters on constitutional grounds. Attorney General John Mitchell began a campaign in 1969 to dispel the notion that preventive detention was unconstitutional. In a piece for the *Virginia Law Review*, Mitchell argued that the presumption of a defendant's innocence did not apply to pretrial proceedings, explaining that the longstanding practice of detaining those accused of capital crimes would otherwise be illegal. Moreover, Mitchell cited legal precedent to support his assertion that the Fifth Amendment's guarantee of due process of law did not prohibit preventive detention.

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The presumption of innocence is not a presumption in the strict sense of the term. It is simply a rule of evidence which allows the defendant to stand mute at trial and places the burden

upon the government to prove the charges against him beyond a reasonable doubt. Apart from the Supreme Court's dictum in *Stack v. Boyle*, there is no basis for thinking that the presumption of innocence has any application to proceedings prior to trial. If it did, the long established practice of pretrial detention of those charged with capital crimes and those found likely to flee, to whom the presumption of innocence applies with equal force at trial, would be unwarranted. Indeed, we have long recognized in the law the propriety of certain forms of temporary pretrial detention such as that necessary to effect arrest and presentment. It has never been thought that these forms of temporary pretrial custody violated the presumption of innocence.

The fifth amendment's due process clause is not an absolute bar to official restraint of persons prior to trial and final judgment. . . .

In a wide variety of situations, official restraint prior to final judgment of conviction for an offense is consistent with due process of law. As discussed above, and equally pertinent here, discretionary denial of bail in capital cases has been authorized by federal law since 1789. No allegation that this authority violates due process requirements has ever received judicial support. Moreover, bail pending appeal following conviction may be denied in the federal court's discretion if it appears that the defendant's release may "pose a danger to any other person or the community." . . .

Deprivations of freedom for substantial periods of time on grounds of anticipated criminal conduct prior to any adjudication of guilt or innocence are authorized under other necessary and reasonable circumstances. For example, federal law authorizes indefinite commitment of persons charged with federal offenses who are determined to be incompetent to stand trial and whose release pending trial would "probably endanger the safety of the officers, the property, or other interests of the United States . . ." This procedure was sustained by a unanimous Supreme Court in *Greenwood v. United States*. In the District of Columbia, a statute which authorizes pretrial commitment to a hospital for a mental examination for a reasonable period, usually sixty days, of persons charged with crime, based only on the court's observations

of the accused or prima facie evidence submitted, has never been considered to contravene due process. . . .

In short, the due process clause of the Constitution does not prohibit pretrial detention in criminal cases. Its requirements are those of reasonableness—the restraints imposed on the liberty of an accused must be reasonable when balanced against society's acknowledged interest in preventing commission of further crimes while the defendant is awaiting trial.

[Document Source: John N. Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," *Virginia Law Review* 55, no. 7 (November 1969): 1231–1235.]

Patricia M. Wald, Alternatives to Preventive Detention,  
Testimony Before Senate Subcommittee on Constitutional  
Rights of the Committee on the Judiciary, January 22, 1969

Those who had fought for bail reforms earlier in the 1960s strongly criticized preventive detention proposals. Patricia M. Wald was a veteran in the field of poverty and criminal justice, having served as a member of or consultant to several national conferences and commissions on these issues and as an attorney in the Office of Criminal Justice at the U.S. Department of Justice. In 1979, President Jimmy Carter appointed her to be a judge of the U.S. Court of Appeals for the District of Columbia Circuit.

In congressional testimony in 1969, Wald pointed to alternatives to preventive detention that she believed would more effectively reduce the incidence of crimes committed by those on pretrial release. These alternatives included increased resources for monitoring defendants as well as a mandate for speedier trials, both of which Congress later adopted with the passage of the Speedy Trial Act and the creation of pretrial services agencies in the federal judicial districts.

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What I would like to emphasize very briefly is that whatever problems have come in the wake of [the Bail Reform Act of 1966], and I do not for a moment think it was the act that caused it, I think they were coming along anyway, we are at least meeting these problems now, confronting them openly, and on the issues, and they are not all being decided behind a front of money bail or no money bail. . . .

The fact that we have nine or 10 agencies in the District [of Columbia], all with possibly the best good will wanting to enforce the act, and the fact that it has not been enforced in the way in which I am sure the drafters meant, points up what I think was our most urgent recommendation, and that is that there be an effective pretrial services agency to see that this act is administered efficiently. Whether it is an expanded Bail Agency or a new, more comprehensive agency would be up to the legislature. . . .

I think the drafters of the act fully realized that perhaps only a limited percentage of people could be released solely on their personal recognizance. On the other hand, they wanted to keep to a minimum the number that would have to be detained because of high bail pending trial. In between would be a wide spectrum whom they hoped the conditions set down in the act originally would help to keep in control. Now, unfortunately, it has not worked out that way. The latest statistics I have seen for the first 9 months of 1968 show that only 13 percent of defendants were being released on conditions. The rest were either placed on money bond and made or did not make it, or they were released totally on their own recognizance.

Now Judge Halleck, I think, has put his finger on it this morning when he told us why judges did not bother with conditions in most cases. That is, they knew they were not going to be enforced. There wasn't anybody out in the community to enforce them. What good a curfew, what good a probation against driving or against going into certain neighborhoods or hanging around with certain people, when, there is absolutely no spot-check system?

This is the sort of thing which I think we are going to have to do if we want to control crime on bail—have good people, including people out in the community, who can make these spot checks, who, if necessary, can call a defendant at his home or go by there every couple of nights and make sure he is in on the curfew. Then I think word of that kind of intensive supervision will, as Judge Halleck noted, get around. I think he is absolutely right. The criminal community knows that the system is lax. The defendant knows that there isn't anybody out there to enforce that condition. He also knows that it will be perhaps a year or a year and a half before he is brought to trial, and I personally have had



defendants say to me that after being out in the community with no contact with the system for a year they felt betrayed at the end of the year and a half when they got notice that their case was coming up to trial. It was as if somebody had pulled a fast one on them, so minimal had been their contact with anybody in the system during the previous year.

Now I won't elaborate at any length on the joys of speedy trial. I think it could solve 90 percent of our bail problems. I will point out that the latest statistics here show that if we could bring people to trial in 30 days, we would get rid of 65 percent of the felonies committed, or rather the felonies for which people are indicted on bail. If we moved it up to 60 days, we would still get over half of them covered 58 percent—and I think it shameful that as high as 20 percent of our felonies on bail are committed or allegedly committed 7 months after the first pretrial release. . . .

Now I believe that many of the recommendations short of preventive detention could do a great deal to help the problem of crime on bail. I personally would support the idea of having criteria of release based on an evaluation that the defendant needs stronger controls on him out in the community to prevent future crime. I think it is perhaps silly to think that the judges are most worried about flight. I think they and the community and everybody are most worried about recidivism on bail. I think to set strong conditions with a strong enforcing agency would be a very good thing, and it would be good to have it out in the open. . . .

I also would support a revocation provision which would allow a person, when he violates those conditions to have his bail revoked after a hearing showing that he has violated them similar to what we now have on probation and parole revocation. I think that these, coupled with the speedy trial measure, certainly deserve first priority when we set out to control crime on bail. My own feeling is that they will perhaps solve a great deal of it, and we will not have to face the very thorny constitutional issue of whether or not we can have preventive detention.

[Document Source: U.S. Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Hearings on Amendments to the Bail Reform Act of 1966*, 91st Cong., 1st sess., 1969, 128–130.]

Laurence H. Tribe, Unfairness and Ineffectiveness of Preventive Detention, *Virginia Law Review*, April 1970

Laurence Tribe, a Harvard Law School professor who came to be known as one of the nation's foremost constitutional scholars, wrote a response to Attorney General John Mitchell's *Virginia Law Review* piece, which had endorsed preventive detention. Tribe argued that while preventive detention would provide psychological comfort and be politically popular, it would likely target minorities disproportionately and do little to reduce crime. Moreover, he asserted that implementing preventive detention would reduce pressure to enact reforms—such as speedier trials and increased monitoring of defendants—that would be more complicated logistically and more expensive, but more likely to make a difference.

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That the Administration's chief legal officer should think it necessary to take so unusual a step may seem strange in light of the dubious ability of pretrial preventive detention to contribute to the control of crime. Offenses committed by persons awaiting trial represent only a small component of the total crime problem. Indeed, if sensible steps were taken to shorten the delays between arrest and trial, impose additional penalties for crimes committed during the pretrial period, and more closely supervise the behavior of those released, this component would become even smaller. Many judges have tried to deal with the problem by practicing a sub rosa form of preventive detention in bail determinations, but the practice has met with little success in separating likely offenders from safe risks. Given the present state of the predictive art, codification of this practice would probably not measurably enhance the safety of the community.

The proposed legislation's capacity to reduce crime is, however, a poor indicator of its political popularity. Its adoption would create the impression that the Administration was taking substantial steps to restore safety to our communities. Since such a delusion might ease the frustration and fear of those who feel helpless in the face of mounting violence, even a false impression of progress would have some value. But the legislation would operate as a dangerous palliative by relieving public pressure for the less dramatic and more expensive types of reform that alone might restore

peace to urban life. And, although the Administration's proposal might purchase psychological comfort for the silent majority, its costs would include the heightened insecurity of the many minorities, both racial and political, who would view themselves as the new law's primary targets. Furthermore, this insecurity would eventually spread beyond these groups, for the approach underlying the proposed legislation threatens the fundamental security provided for all of society by a system that guarantees that no one need fear prolonged imprisonment as a criminal until it is proved beyond a reasonable doubt that he has engaged in clearly prohibited conduct.

[Document Source: Laurence H. Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell," *Virginia Law Review* 56, no. 3 (April 1970): 371–374.]

Judge Charles W. Halleck, Effectiveness of Preventive Detention, Testimony Before Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, January 22, 1969

Judge Charles Halleck served on the District of Columbia Court of General Sessions, a court exercising local civil and criminal jurisdiction that in 1970 became part of the new Superior Court of the District of Columbia. In his testimony before Congress, Halleck argued in favor of preventive detention based on his experience and observations in the District of Columbia. A spiraling crime rate combined with increased legal representation for indigent defendants had led to a reduction in guilty pleas and a massive backlog of cases waiting to be tried. Defendants, according to the judge, were taking advantage of congested criminal dockets, knowing that if they demanded a trial they would likely remain free on bail and even if convicted, might remain free pending an appeal. The only solution, he asserted, was to detain defendants posing a danger to the community while also increasing resources to clear the backlog and reduce delay.

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I favor amending the Bail Reform Act to provide for preventive detention of certain obviously dangerous offenders, and for similar detention in times of riot or civil disturbance. I firmly believe that an experienced trial judge can make such a prediction based upon adequate factual material relating to a defendant's past re-

cord and his current community situation. Much has been written and said regarding the constitutionality or the feasibility of such an amendment. May I respectfully suggest that the primary difficulty with the concept of such an amendment is the inordinate and unjustifiable delay in the trial of criminal cases in the courts of the District of Columbia. The courts themselves, although responsible in some measure for the delay, are also victims of an ever-increasing caseload reflecting our spiraling crime rate. . . .

Most criminal defendants are classified as “indigent” in the District of Columbia and are represented by court-appointed attorneys. These attorneys now are paid pursuant to the Criminal Justice Act. Their clients are for the most part out on personal bond. There is no incentive and no reason why any of these defendants should do anything other than demand trial by jury and thereafter create delay. Their lawyer gets paid for it, and the longer the delay the more it works to the advantage of the defendant who is out on the street laughing in the face of his victims and the arresting officers. . . .

Furthermore, if a defendant finally goes to trial in this jurisdiction and is convicted, for the most part he will be entitled to a free appeal. This appeal will result in additional delay of at least 1 year, and he is likely to be still released on personal bond pending appeal. We have become so enamored of a defendant’s rights, interests and well-being that we have now created a situation which the trial courts cannot possibly cope with. There is no reason or incentive for the obviously guilty to plead guilty. The incentive is all to the contrary. There is no way, as I see it, in the present make-up of the system of criminal justice in the District of Columbia by which any significant inroads can be made in the backlog problem. The limited number of judges and other personnel, coupled with a system that favors defendants and puts a premium on delay, has, if you will, hoist us on our own petard.

Now I have digressed on this point because I believe it demonstrates that we must face pragmatically the prospect of deciding whether to amend the act so as to confine the potentially dangerous defendant without bond for a substantial period of time, which may amount to months and possibly years before he comes to trial, or alternatively releasing him into the community

where in many instances he will commit further criminal depredations upon society. . . .

Now I cite these foregoing matters simply to demonstrate that a good deal of the difficulty which we face in the administration of the Bail Reform Act stems from problems of court congestion, from lack of trained and experienced personnel, both in the prosecutor's office and as defense attorneys; and finally from the complete knowledge in the criminal community of these very problems and the fashion in which they are dealt with by our system. We cannot hope to solve the problems of the Bail Reform Act without facing these other problems, and realizing that they are hopelessly intertwined. We must come to grips with them, and we must be able to appropriate and spend the funds necessary to establish not only an adequate and well equipped police department, but a numerically adequate and properly staffed court system which should include, I submit, a well-paid and experienced staff of prosecutors and a similarly well-paid and experienced public defender system as well as enough clerks, probation officers, and all other supporting services to do the job. And unless and until we do those things, we will continue to have improperly prosecuted cases and we will continue to have delays of up to 6 months to a year in the trial of these cases. And it is this delay in the framework of the system which emphasizes all of the problems of bail for defendants. As I have indicated, if we could try a criminal defendant within 30 to 60 days, and complete his appeal within 3 months, then we would not be faced with this extreme concern for the evils of long confinement prior to trial, nor I submit would we be as likely to have all of the other attendant problems which come about because of what is rapidly becoming a breakdown in the administration of justice, criminal justice in the District of Columbia.

[Document Source: U.S. Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Hearings on Amendments to the Bail Reform Act of 1966*, 91st Cong., 1st sess., 1969, 91-94.]

## *Speedy Trial Act of 1974*

Debate over the impact of the 1966 Bail Reform Act implicated systemic issues facing the nation's criminal justice system. Both supporters and critics of preventive detention acknowledged that the federal courts were experiencing huge backlogs of criminal cases, a problem that was growing more serious as crime levels rose.

The debate over preventive detention therefore led to a series of proposals to mandate that courts bring criminal cases to conclusion more quickly. The proposals had widespread bipartisan support as both conservatives and liberals saw speedy trial reforms as a way to achieve their goals. Some focused on the reform's potential to improve efficiency in the courts and become a weapon against rising crime rates; others emphasized its purpose of enforcing a defendant's right to a speedy trial, especially important for defendants who could not make bail, and to offer an alternative to preventive detention proposals.

Speedy trial initiatives had been proliferating in the states with the support of the ABA. In 1967, the ABA's Project on Minimum Standards for Criminal Justice released its Standards Related to a Speedy Trial, which called for dismissal of cases not brought to trial in a timely manner, along with other procedural mechanisms to reduce continuances and delays in criminal cases.

The most controversial aspect of speedy trial proposals was dismissal of all charges with prejudice as the remedy for cases prosecutors and district courts failed to bring to a speedy resolution. This policy, by which Congress would impose significant procedural requirements on the federal courts, represented to some an intrusion on the separation of powers between Congress and the judiciary.<sup>53</sup>

The congressional debate over speedy trial bills often focused on technical provisions, but involved fundamental issues facing the federal criminal justice system in the early 1970s. Policymakers were forced to grapple with the relationship between defendants' rights and court

53. The authority of Congress to establish procedural requirements for the federal courts was not generally in dispute, having been exercised since the Process Acts of 1789 and 1792 and continuing with the adoption of the Federal Rules of Civil Procedure in 1938. Proposals for speedy trial legislation, however, went further by providing for a dispositive remedy—dismissal with prejudice—in the event procedural requirements were not met.

procedure, the dramatic reduction in guilty pleas due to the greater availability of counsel for indigent defendants, and the resulting explosion in the number of criminal trials the system was forced to handle. Ultimately Congress decided that finding ways to bring trials to speedier conclusions was preferable to keeping more defendants locked up for longer periods of time prior to trial and conviction.

Representative Abner J. Mikva, Introduction of Pretrial Crime Reduction Act, House of Representatives, Speech of November 17, 1969

With the debate over preventive detention raging in 1969, Representative Abner Mikva, a Democrat from Illinois, sought to refocus the discussion on other potential remedies to the problems bail reform had created. As an alternative to preventive detention, Mikva introduced the Pretrial Crime Reduction Act, which included a mandate for speedy trials as well as the establishment of pretrial services agencies to monitor defendants on pretrial release and assist the courts in ensuring that conditions of release were being met. In 1979, President Jimmy Carter appointed Mikva to the U.S. Court of Appeals for the District of Columbia Circuit.

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I present the Pretrial Crime Reduction Act as an effective and constitutional way to deal with the problem of crime committed by defendants released prior to trial. I also frankly present it as an alternative to proposals for preventive detention which I consider both inconsistent with our traditional system of criminal justice and, as Senator SAM ERVIN has eloquently argued, unconstitutional. The Pretrial Crime Reduction Act does not rely for its effectiveness on throwing into jail “dangerous” defendants before they have had the benefit of their constitutionally guaranteed jury trial. It does provide the community protection against one-time offenders who, a judge determines, present a substantial risk of danger. It does this not by putting them in jail, but by four alternative techniques—all of which are constitutional and all of which will be effective if properly administered and funded. . . .

What I want to stress is that the Pretrial Crime Reduction Act is an approach to the problems of crime by defendants released prior to trial which does not rely on jailing criminal defendants before

they are found guilt[y]. It provides to the judge alternative methods to insure supervision and control of dangerous defendants, it provides pretrial services agencies with adequate resources to make those pretrial controls effective, and it insures that defendants are brought to trial quickly enough that the pretrial controls need be used only for a minimum time. Most important, by preserving the defendant's right to pretrial release in noncapital cases, the Pretrial Crime Reduction Act avoids the repugnant, and probably unconstitutional, alternative of preventive detention. It thus avoids that radical departure from our traditional presumption of innocence, and averts a likely confrontation with the Supreme Court by taking a more moderate approach to the problem of pretrial crime.

Preventive detention is undesirable for many reason[s]: It is an overreaction to a problem of which we do not yet even know the full dimensions; it is probably unconstitutional, which means that ultimately some other alternative must be found anyway; it simply would not work as a practical matter because it would overload already overtaxed jails and correctional facilities, and because judges would hesitate to use it; and finally, it is a simplistic and easy answer to a complex and difficult problem. When we think of the damage caused by crimes committed by men released prior to trial—and no one really knows how much of such crime there is—preventive detention may sound like an easy answer. But when we consider the problem in the light of our traditional system of criminal justice—presumption of innocence, constitutional safeguards to insure the defendant's ability to prove his innocence at trial, guarantee of a trial by jury of one's peers—right to counsel, privilege against self-incrimination—when we look at preventive detention in light of these considerations, then it becomes quite obviously a short cut which will cancel out all the carefully constructed safeguards of the criminal justice system built up over almost 180 years.

For years we have starved the courts, jails, corrections systems. We have provided inadequate manpower and resources to our courts, jails and parole services—and now we wonder why the system does not work the way it should. The answer is not to cut corners on the defendant's constitutionally guaranteed rights; it is to b[e]gin to provide the resources necessary to make



the criminal justice system work the way it was intended to. My bill does this. It establishes a congressional mandate for speedy trials. It requires each United States district court to inform the Judicial Conference, the Attorney General, and Congress within 1 year of the additional authorizations and appropriations which it will require to meet the speedy trial requirements established in this bill. At long last Congress will have a report from the men on the front line, the judges, marshals, ba[i]liffs, and defense counsels, prosecutors, and parole supervisors, of what they need to do the job we have asked them to do.

[Document Source: *Congressional Record*, 91st Cong., 1st sess., 1969, 115, pt. 25:34334–34335.]

Attorney General John N. Mitchell, Opposition to Speedy Trial Legislation, Address to American Bar Association, July 16, 1971

The Department of Justice was highly critical of congressional speedy trial legislation, Attorney General John Mitchell and his deputies criticizing it as arbitrary and inflexible, particularly with respect to the proposal that cases not resolved quickly be dismissed with prejudice. In a speech to the American Bar Association in 1971, Mitchell placed the blame for delays on defense counsel, who were exploiting new procedural rules designed to protect defendants' rights that had proliferated as a result of Supreme Court rulings during the 1960s. Mitchell decried the increasing number of what he termed "legalisms" that gave defendants too much leverage in the plea-bargaining process, delayed the resolution of cases, and weakened the ability of the criminal justice system to punish the guilty.

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Recommendations have come from many sources. One approach to assure speedy trials is simply to dismiss all criminal cases if they are not brought to trial in a given period, and this has actually been adopted in some courts. It has been proposed that a trial on a Federal offense shall be commenced within sixty days—excluding certain specified possible delays—and that otherwise the case shall be dismissed with prejudice.

This, in my view, is what might be called a non-solution. The purpose of the Sixth Amendment is, among other things, to assure

a speedy trial—not to withhold the process of justice altogether. Under this approach, innocent defendants are not vindicated and guilty defendants are not forced to recognize their wrongdoing. And, of course, in the case of the guilty person who is set free, the public pays the price in further crimes perpetrated both by the uncorrected criminal and by others who are emboldened by his example.

It takes no prophet to foresee that such an arbitrary solution would strengthen the defendant's hand in negotiating a guilty plea to an unreasonably lenient charge. In fact, under such circumstances the sudden rush of defendants to claim their right to trial, far from unclogging the courts, would overwhelm them.

Clearly, this solution attacks only the symptom of court delay, not the causes. In an effort to satisfy the Constitution's Sixth Amendment, it runs counter to the Constitution's very preamble—to "establish Justice." Carried to its logical conclusion, this approach would not only dismiss cases, it would dismiss the function of the courts. It says to us that no justice is better than slow justice. I will not say that this meat cleaver approach reflects the mind of Dick the butcher, but it does provide a classic example of throwing out the baby with the bathwater. . . .

I want to isolate the real subject of my remarks—the Hydra of excess proceduralism, archaic formalisms, pretrial motions, post-trial motions, appeals, postponements, continuances, collateral attacks, which can have the effect of dragging justice to death and stealing the very life out of the law.

We face in the United States a situation where the discovery of guilt or innocence as a function of the courts is in danger of drowning in a sea of legalisms.

I refer to the overabundance of pretrial hearings designed mainly to deprive the jury of material and relevant evidence.

I refer to the meticulous requirements that only can be characterized as ritual for its own sake.

I refer to the endless post-trial appeals . . . .

We see in such examples the flowering of whole generations of legalisms, one upon another, until a gulf of obscurity separates the law from the people. Many defense attorneys will raise every conceivable argument, however frivolous and long-drawn, either out of pure litigiousness, or to protect themselves against future

charges of “ineffective assistance of counsel.” And the courts often let them go to such unreasonable lengths, with consequent delay, for fear that the appellate courts will somehow find error, even in the most reasonable attempts to control excess litigiousness. . . .

The judiciary can also examine the drift of American criminal justice from a larger perspective. It can begin to recognize that society, too, has its rights, including the right to expect that the courts will do justice, that the innocent will be cleared, and the guilty will be corrected.

It can give as much attention to the Constitutional right to a speedy trial as it does to other Constitutional rights.

It can recognize that perhaps it has been too preoccupied in the exhilarating adventure of making new law and new public policy from the bench, and that this function of the courts has outdistanced the more sober task of judging guilt and innocence.

The crowded calendars, the breakdown of speedy justice, the loss of public confidence in the courts—these are the advanced symptoms of an ailment that has permeated our justice system. The ailment should have been cured long before the patient reached the chronic stages of infirmity that I described.

[Document Source: John N. Mitchell, “In Quest of Speedy Justice,” Address before the American Bar Association, London, England, July 16, 1971, 3–5, 7–9, 14.]

Assistant Attorney General William H. Rehnquist, Criticism of Dismissal Sanction, Testimony Before Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, September 14, 1971

In 1971, the Senate Judiciary Committee Subcommittee on Constitutional Rights held extensive hearings on a speedy trial bill introduced by Senators Sam Ervin and Roman Hruska and sponsored by forty-eight senators. The bill instructed district courts to devise comprehensive plans to expedite criminal cases and mandated that cases not brought to trial within sixty days of an indictment be dismissed with prejudice, meaning that prosecutors could not bring the charges again.

In Senate testimony, Assistant Attorney General William H. Rehnquist objected to the dismissal sanction as inflexible and one-sided. Rehnquist questioned the utility of a remedy for delay that would

leave criminals unpunished and pointed out that charges could easily be dismissed through no fault of the prosecution if there were not enough judges available to try cases.

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Viewed from the point of the prosecutor, which, of course, is one of the functions of the Department of Justice in the Federal criminal system, this provision [dismissal after sixty days] is not only draconic, but quite one-sided in its sanctions. While prosecutors as a whole must undoubtedly bear their share of responsibility for the delay that sometimes appears to be endemic in our system of criminal justice, as a matter of fairness it does not seem that the drastic sanction of dismissal with prejudice should be visited upon the prosecution, without any corresponding sanction visited on the defendant.

The apparent one-sidedness of the sanction is emphasized by the fact that, with due regard for the bill's exceptions and its exclusions of certain periods of time in computing the 60-day period, it is nonetheless entirely possible that a criminal prosecution could be dismissed without any fault on the part of the prosecution, simply because there were not adequate judges available to preside at the trial within the time limits specified in the bill.

The result would be that a defendant held to answer for a serious crime would go scot-free—neither convicted nor acquitted. . . .

None of us interested in the administration of criminal justice . . . whether inside or outside of the Government, whether within or without the bench or bar, can fail to be struck by the stark fact of intolerable delays in our system of administering criminal justice. The Department is of the view that some of the root causes of this unjustifiable delay must be sought out, identified, and dealt with, regardless of whether the solution for any particular facet of the problem tends to bear more heavily on one side of the criminal justice equation than the other.

[Document Source: U.S. Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Hearings on S. 895, A Bill to Enforce the Sixth Amendment Right to Speedy Trial*, 92nd Cong., 1st sess., 1971, 96.]

Senator Sam J. Ervin, Jr., Importance of Congressional Speedy Trial Mandate, Opening Statement to Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, April 17, 1973

Senator Sam Ervin's original speedy trial bill was not reported out of the Senate Judiciary Committee in 1972, in part because of the objections of the Judicial Conference of the United States. The governing body of the federal judiciary preferred to allow the district courts themselves to determine the appropriate solutions to criminal trial delays, rather than leave it to Congress. In April 1972, the Supreme Court approved Rule 50(b) of the Federal Rules of Criminal Procedure, which instructed district courts to establish comprehensive plans for expediting disposition of criminal cases.

Ervin moved ahead with speedy trial legislation, however, and introduced another bill in 1972. In remarks prior to April 1973 hearings, Ervin explained why he believed the impetus to reform in the criminal justice system had to come from Congress, rather than being left to the courts or the Department of Justice. In response to the sentiments of Attorney General John Mitchell, who emphasized that Congress should attack the causes of delay rather than mandate speed, Ervin stated that it would be difficult or even impossible to adopt the host of measures required to address an amorphous and imperfectly understood situation. Ervin reasoned that it would be better to inject urgency into the system by establishing significant consequences for delay. Responding to criticisms of his original proposal that the dismissal sanction was one-sided, Ervin included in the new bill penalties for delays attributable to defense counsel.

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In light of the experience under the Sixth Amendment and in anticipation of what is apparently happening under Rule 50(b), I am convinced that only Congress, not the courts acting alone nor the Justice Department acting alone, can break this logjam. The solution must be imposed from outside the Federal criminal justice system itself. Only Congress has such authority. Congress can create the initiative to seek speedy trial on the part of all components in the criminal justice system by mandating it through legislation. And, in the final analysis, the ultimate responsibility for speedy trial is ours because only Congress can order courts, pros-

ecutors, and defense counsel alike to seek speedy trial and at the same time provide the resources to achieve that goal.

Not only have the courts, prosecutors and defense counsel been unable to remedy delay on their own, but they have also been unable or unwilling to provide a comprehensive explanation for the causes of delay. If Congress will mandate speedy trial through legislation, the courts, prosecutors and defense counsel will be forced not only to seek speedy trial but to discover the specific causes of delay in their own respective districts.

This dearth of knowledge about the causes of delay and the possibility that causes may vary from district to district suggest that we cannot end delay in the Federal courts by legislating specific criminal justice reforms. We simply cannot legislate away the “underlying causes of delay” because we do not even know what they are. For example, I am not convinced that we know enough about these “underlying causes” to enact habeas corpus reform, modification of the exclusionary rule, abolition of the grand jury, enactment of an omnibus hearing procedure or more liberal pretrial discovery as a substitute for speedy trial legislation. . . .

We are on much firmer ground if we enact the time limits in S. 754. We can develop these time limits in light of what we feel should be an ideal, in much the same manner as the American Bar Association formulated its standards on Speedy Trial. Then if we delay the effective date of these time limits each district will come forward with a comprehensive analysis of the causes of delay in its own jurisdiction and specific proposals for legislation and requests for additional resources. Then and only then will Congress know enough to seek legislative solutions to the underlying causes of delay.

A time limit without enforcement is merely an empty plea. The only effective enforcement mechanism anyone has suggested is the dismissal sanction. It is effective because it gives one of the participants in the criminal justice process, defense counsel, a selfish reason to seek speedy trial. I recognize that outright dismissal is a harsh sanction but it is the only one that promises to be effective. . . .

Since a sanction against only one or two of the parties is not only unfair, but makes for defective legislation S. 754 also has other sanctions on the defendant. . . .

To many, these sanctions may seem harsh. There are two answers to that complaint. First, it is now clear that no one will be motivated unless the penalty for delay is clearly stated. Second, I am confident that neither the courts or the prosecution will sit on their hands under the threat of dismissals.

[Document Source: U.S. Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Hearings on S. 754, A Bill to Give Effect to the Sixth Amendment Right to a Speedy Trial for Persons Charged with Criminal Offenses and to Reduce the Danger of Recidivism by Strengthening the Supervision Over Persons Released Pending Trial, and for Other Purposes*, 93rd Cong., 1st sess., April 17, 1973, 3–4.]

Daniel J. Freed, Support for Speedy Trial Act of 1974,  
Testimony Before House Subcommittee on Crime of the  
Committee on the Judiciary, September 18, 1974

The inflexible deadlines of the original speedy trial bill gradually became more flexible as debate carried on in 1973 and 1974. The statute Congress ultimately passed dispensed with the 60-day limit for bringing a case to trial and replaced it with a 100-day limit consisting of a 30-day limit between arrest and indictment; a 10-day limit between indictment and arraignment; and a 60-day limit between arraignment and trial. The sanction for prosecutorial violation of these limits—dismissal of the case with or without prejudice, depending on various factors for the judge to consider—was not to go into effect until July 1, 1979, so that the federal courts could craft plans for complying with the law.

In testimony in support of the revised speedy trial bill in 1974, Daniel J. Freed, a law professor at Yale and former director of the Justice Department's Office of Criminal Justice, argued that self-imposed court rules could not remedy systemic problems in the criminal justice system. Pointing out the extent to which the bill had been modified to address previous objections, Freed pleaded with Congress to adopt a legislative mandate for achieving speedy trials in federal criminal prosecutions.

Freed's fears that Congress would not enact as strong a speedy trial mandate as he hoped proved prescient. In 1979, shortly before the dismissal sanctions were to go into effect, Congress passed amendments to the original act, proposed by the Department of

Justice and the Judicial Conference, to postpone the dismissal sanctions, lengthen the time limits for bringing a case to trial, and give judges greater discretion to extend time limits in certain instances.

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Delay in the disposition of individual criminal cases is not the result simply of two attorneys and a judge failing to dispose of one case with reasonable speed. It is the by-product of a system characterized by large caseloads, inadequate manpower or inefficient management, conflicting desires respecting the advantage or disadvantage of delay, and the absence of a timetable which all parties respect. In the federal system, judges can set and attempt to enforce norms for early disposition, but they are powerless to adhere to their own timetable, or to insist that the litigants do so, when authorized judgeships go unfilled, or when the prosecutor's staff is too small in relation to its caseload, or when grand juries sit only once or twice a year. Problems like these are rooted in the inadequacy and misallocation of resources for all parts of the system. They are beyond the power of judicial will or court rules to remedy. It is therefore not surprising that the early experience under Federal Rule 50(b) demonstrates, despite high intentions, that the judiciary has not, and in many ways probably cannot, fulfill the modest expectations of its own model plan. . . .

[F]indings [about the implementation of district plans] suggest critical weaknesses in any contention that the judiciary's self-imposed plan for promptness, without sanctions and without resources, can materially affect the speed with which federal criminal cases are terminated. By 50(b) the federal courts gave new priority to addressing the issue of delay, but the issue is larger than the Judicial Branch can solve by itself. No amount of delay in the enactment of legislation is likely to increase the chances that unilateral rulemaking will accelerate criminal trials, unless wholesale dismissals, or compromises, or curtailment of rights is also part of the package. . . .

Against this background, how far and how fast have we come to making speedy trial a reality in the federal courts? It is seven years since the National Crime Commission recommended that the nation's courts be placed on a time-table for the disposition



of criminal cases in nine months from arrest through appeal. It is six years since the American Bar Association adopted standards for speedy trial which urged that, by rule or by statute, all jurisdictions should set limits within which criminal cases are to be tried or dismissed with prejudice. It is five years since an outgoing administration in the Department of Justice formulated a speedy trial statute calling for 60 day trials, adequate resources and dismissal with prejudice for noncompliance, and placed it on the desk of incoming Attorney General John Mitchell. It is four years since Senator Ervin and his colleagues in the Congress began the painstaking process of formulating federal legislation to build a system capable of accomplishing those goals.

During the intervening years countless objections and recommendations have been received and absorbed to arrive at S. 754. The dismissal with prejudice sanction has been dropped. The 60 day trial target has been extended to 90 days. Its effective date has been put off for five years. As a result, even if the bill were enacted today, the 90 day target would not come into play until 1979. The modest sanction of dismissal with a burden on the Government to reinstate prosecution would not become operative until 1981.

Perhaps fourteen years is a reasonable period within which to implement the unanimous speedy trial recommendation of the 1967 Presidential Commission . . . . Perhaps thirteen years is time enough to go part way towards the dismissal with prejudice standard the legal profession adopted when the ABA met in February 1968. But 1981 is still a long way off. It will recede still further unless the pleas for legislative abstinence, and for continued patience with judicial rulemaking and Justice Department pondering, are answered by a 1974 statute that asserts the responsibility of Congress to end the supremacy of delay in the criminal process.

[Document Source: U.S. House of Representatives, Subcommittee on Crime of the Committee on the Judiciary, *Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773 and H.R. 4807, Speedy Trial Act of 1974*, 93rd Cong., 2nd sess., 1974, 260-261.]

## *Bail Reform Act of 1984*

Passage of the Speedy Trial Act of 1974 did not put to rest the question of preventive detention. Between 1978 and 1984, Congress once again debated changes to the bail system.

By the early 1980s, there was bipartisan support in Congress for comprehensive crime legislation, including the idea that judges ought to be able to consider a defendant's potential dangerousness in making pretrial release decisions. Chief Justice Warren Burger spoke in favor of such a policy change in 1981, and the Attorney General's Task Force on Violent Crime, co-chaired by former Attorney General Griffin Bell, concurred.<sup>54</sup> Many states had already implemented some form of preventive detention; since 1966, twenty-three states had changed their laws to allow consideration of a defendant's dangerousness. In addition, the Court of Appeals for the District of Columbia upheld the constitutionality of the preventive detention measure Congress had enacted for the District of Columbia in 1970.

While preventive detention proposals varied, Congress, by passing the 1984 Bail Reform Act (as part of the Comprehensive Crime Control Act), elected to permit judges to detain without bail dangerous defendants charged with particular violent crimes. Judges already possessed this discretion with respect to defendants charged with capital crimes, and the 1984 reforms extended it to other felony defendants and additionally allowed judges to consider dangerousness when setting money bail. Supporters of the new act pointed out that, despite the 1966 bail reforms, many judges continued to set high money bail as a de facto form of preventive detention, and that by bringing preventive detention practices out into the open, the law would serve to protect the rights of defendants subject to such practices.

### Senate Judiciary Committee, Favorable Report on Preventive Detention Bill, August 4, 1983

In its report on the bill providing the basic elements of what became the Bail Reform Act of 1984, the Senate Judiciary Committee addressed the major objections to preventive detention. The refusal of the House of Representatives to consent to a preventive deten-

54. Attorney General's Task Force on Violent Crime, *Final Report* (August 17, 1981).

tion measure in a previous crime bill had contributed to President Ronald Reagan's veto of the bill. In response to the assertion that judges could not effectively predict defendants' future behavior, the report's authors pointed out that judges' decisions in setting money bail were already determined by such predictions with respect to the likelihood that a defendant would appear for trial. The report echoed the sentiments of senators from both parties that the safety of the community was a legitimate factor for judges to consider when making decisions on pretrial detention. In recognition of the fact that judges were already using high money bail to detain defendants based on dangerousness, the report explained that the new bill prohibited this practice and mandated that if judges wished to detain a defendant, they do so "honestly." The government would be required to present evidence of dangerousness, the court would have to make an explicit finding of dangerousness on the record, and the defendant would be given an opportunity to respond.

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The question whether future criminality can be predicted, an assumption implicit in permitting pretrial detention based on perceived defendant dangerousness, is one which neither the experience under the District of Columbia detention statute nor empirical analysis can conclusively answer. If a defendant is detained, he is logically precluded from engaging in criminal activity, and thus the correctness of the detention decision cannot be factually determined. However, the presence of certain combinations of offense and offender characteristics, such as the nature and seriousness of the offense charged, the extent of prior arrests and convictions, and a history of drug addiction, have been shown in studies to have a strong positive relationship to predicting the probability that a defendant will commit a new offense while on release. While predictions which attempt to identify those defendants who will pose a significant danger to the safety of others if released are not infallible, the committee believes that judges can, by considering factors such as those noted above, make such predictions with an acceptable level of accuracy. Predictions of future behavior with respect to the issue of appearance are already required in all release decisions under the bail reform act, yet one study on pretrial release suggests that pretrial rearrest may be susceptible to more accurate prediction than nonap-

pearance. Furthermore, as noted in testimony before the committee, current law authorizes judges to detain defendants in capital cases and in post-conviction situations based on predictions of future misconduct. Similarly, a federal magistrate may detain a juvenile . . . pending a juvenile delinquency proceeding in order to assure the safety of others. The committee agrees that there is no reason that assessments of the probability of future criminality should not also be permitted in the case of adult defendants awaiting trial. In sum, the committee has concluded that pretrial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released.

While providing statutory authority for pretrial detention is a substantial change in federal law, it is well known that a substantial minority of federal defendants in the past have in fact been detained pending trial, primarily because of an inability to meet conditions of release. Under the bail reform act, it is permissible for a defendant to be detained if he is unable to meet conditions of release that have been determined by a judge to be reasonably necessary to assure his appearance. However, it has been suggested that the phenomenon of pretrial detention under the bail reform act is often the result of intentional imposition of excessively stringent release conditions, and in particular extraordinarily high money bonds, in order to achieve detention. Furthermore, it has been suggested that in many cases, while the imposition of such conditions has apparently been for the purpose of assuring the defendant's appearance at trial, the underlying concern has been the need to detain a particularly dangerous defendant, a concern which the bail reform act fails to address.

Although there is a question of the extent to which the authority to set conditions of release may have been abused to achieve detention of particularly dangerous defendants, in view of the bail reform act's failure to give judges any mechanism to address the inevitable and appropriate concern they would have about releasing an arrested person who appears to pose a serious risk to community safety, it is, as recently noted by Senator [Orrin] Hatch, '(n)o wonder many judges laboring under this law admit using 'extreme rationalizations in circumventing' this policy'. . .

The committee does not sanction the use of high money bonds to detain dangerous defendants; but criticism of this practice should be focused not on the judiciary, but rather on the deficiencies of the law itself, and indeed, on the delay in amending the law to cure this problem . . . .

Providing statutory authority to conduct a hearing focusing on the issue of a defendant's dangerousness, and to permit an order of detention where a defendant poses such a risk to others that no form of conditional release is sufficient, would allow the courts to address the issue of pretrial criminality honestly and effectively. It would also be fairer to the defendant than the indirect method of achieving detention through the imposition of financial conditions beyond his reach. The defendant would be fully informed of the issue before the court, the government would be required to come forward with information to support a finding of dangerousness, and the defendant would be given an opportunity to respond directly. The new bail procedures promote candor, fairness, and effectiveness for society, the victims of crime—and the defendant as well. It is the intent of the committee that the pretrial detention provisions of section 3142 are to replace any existing practice of detaining dangerous defendants through the imposition of excessively high money bond.

[Document Source: U.S. Senate, Committee on the Judiciary, *Comprehensive Crime Control Act of 1984*, S. Rep. 98-225, 98th Cong., 1st sess., August 4, 1983, 9–11.]

## *Habeas Corpus Reform*

A writ of habeas corpus (Latin for “you shall have the body”) directs the custodian of a prisoner to bring that prisoner before a court and explain the reasons for his or her confinement. The writ is a challenge to the legality of a prisoner's detention and does not directly or necessarily entail an inquiry into the prisoner's guilt or innocence. After examining the reasons for confinement, the court issuing the writ may release the prisoner or remand the prisoner into custody. The “great writ of liberty,” as it is often called, is a judicial remedy aimed at preventing the arbitrary use of executive power to imprison individuals without just cause.

The use of habeas corpus has roots in English common law dating to the fourteenth century and became a part of England's statutory law in 1679. The U.S. Constitution made no explicit provision for the writ, but Article I, Section 9, Clause 2, provided, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

In the latter half of the twentieth century, debates over habeas corpus focused on the federal courts' use of the writ as a tool for the review of criminal convictions in the state courts, known also as a "collateral attack" upon the conviction by the petitioner. The central issue was the proper role of the federal courts in reviewing convictions that had already been upheld at every level of a state court system. The debate implicated federalism, the operation of the state and federal criminal justice systems, and the due process rights of individual criminal defendants.

Prior to the Civil War, federal courts could issue a writ of habeas corpus only to federal prisoners except in very limited circumstances. In 1867, in an effort to protect freed slaves and Union supporters from unjust treatment in the state courts of the South, Congress made the writ available to any person "restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." The 1867 Act set in motion an evolution of habeas corpus that eventually resulted in federal courts conducting broad review of criminal convictions in state courts to determine whether state court proceedings had deprived defendants of federal rights.

In the late nineteenth and early twentieth centuries, the Supreme Court imposed significant restrictions on the use of habeas corpus, limiting its efficacy as a tool for the protection of due process rights in state and federal courts, but those restrictions began to dissolve in the 1950s and 1960s. In its 1953 decision in *Brown v. Allen*, the Court took an expansive view of district court collateral review of state court convictions.<sup>55</sup> In a trilogy of 1963 decisions—*Townsend v. Sain*,<sup>56</sup> *Fay v. Noia*,<sup>57</sup> and *Sanders v. U.S.*<sup>58</sup>—the Court removed many of the procedural obstacles to federal habeas corpus review, facilitating the filing

55. 344 U.S. 443 (1953).

56. 372 U.S. 293 (1963).

57. 372 U.S. 391 (1963).

58. 373 U.S. 1 (1963).

of more petitions by state prisoners. For example, the Court ruled that a prisoner could raise new constitutional issues in a petition that had not been raised in state court, a decision that allowed district courts to review the facts underlying a conviction. Prisoners could also submit subsequent petitions even if previous petitions had been denied, so long as each petition raised a new constitutional issue.

In his dissent in the *Brown* case, Justice Robert Jackson predicted that “floods of stale, frivolous and repetitious petitions will inundate the dockets of the lower courts and swell our own.” The Supreme Court’s expansion of criminal due process protections did indeed open the door to a flood of new habeas petitions. In 1961, state prisoners filed 1,020 habeas petitions in federal district court and federal prisoners filed 868. By 1971, those numbers had increased to 8,372 and 1,671, respectively. In that year, appeals from the denial of habeas corpus petitions from state prisoners made up 13 percent of filings against the federal government in the U.S. courts of appeals.<sup>59</sup>

The increase in habeas corpus petitions during a time in which the federal courts were already facing severe caseload pressures led to a decades-long debate on whether and how to reduce the number of prisoner petitions in federal court. The expanded nature of habeas corpus review thrust the federal courts into the position of supervising state criminal justice to an unprecedented degree. Proponents of limiting habeas corpus petitions argued that such extensive federal review of state convictions undermined the authority of state judiciaries and made finality in criminal judgments almost impossible to achieve. Judges expressed frustration that many of the petitions filed were frivolous or repetitive, and hurt the ability of the courts to give proper consideration to real miscarriages of justice. Defenders of expansive access to habeas corpus responded that it was the duty of the federal courts to ensure enforcement of the constitutional rights of the country’s most vulnerable citizens, particularly African Americans, who could not count on impartial justice in many of the nation’s state courts.

In subsequent decades, the Supreme Court retreated from its earlier, more expansive conception of habeas corpus, limiting or overturning many of the Warren Court habeas decisions. The debate over

59. *Annual Report of the Director of the Administrative Office of the United States Courts*, 1971, Table 17 and Appendix I, Table B-7.

habeas corpus reform culminated in the Anti-Terrorism and Effective Death Penalty Act of 1996, which Congress passed in the wake of the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City. The 1996 statute dramatically limited petitions for habeas corpus in federal court. It created a one-year filing deadline for such petitions and eliminated successive petitions by allowing only one chance for federal review of all constitutional challenges. The statute also provided that federal courts must presume to be true any facts determined by state courts unless the petitioner proved otherwise by clear and convincing evidence.

Paul M. Bator, Importance of Finality in Criminal Proceedings, *Harvard Law Review*, January 1963

The Supreme Court's 1963 trio of habeas corpus decisions quickly sparked debate about the proper limits of the writ. Paul M. Bator, a professor at Harvard Law School and an expert on the federal courts, wrote an article in which he reflected on the tension between the need for finality in criminal procedure and the need to guarantee fair trials. Bator disagreed with the Court's statement in the *Sanders* case that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." The criminal justice system could not be effective, he argued, if it operated on the assumption that the courts were incapable of delivering justice in the first instance or that state courts could not be entrusted with enforcing federal rights.

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[O]ur century has peculiarly sensitized us to and made us fearful of abuses of power exercised through the legal process; we find the claims of liberty, of our residue of autonomy, particularly sweet in an age of dictators, political prosecutions and concentration camps. More crucial, even, is our general and deep-seated uneasiness about the ethical and psychological premises of the criminal process itself. The notion that a criminal litigation has irrevocably ended may have been an acceptable one in an age with a robust confidence in (or, if you prefer, complacency about) the rationality and justice of the basic process itself. But no such confidence or complacency can be said to exist today. . . .

In short, our fear (and, in some, conviction) that the entire apparatus of the criminal process may itself be fundamentally un-



just makes us peculiarly unwilling to accept the notion that the end has finally come in a particular case; the impulse is to make doubly, triply, even ultimately sure that the particular judgment is just, that the facts as found are “true” and the law applied “correct.” . . .

The ultimate issue I propose to treat is this: under what circumstances should a federal district court on habeas corpus have the power to redetermine the merits of federal questions decided by the state courts in the course of state criminal cases? . . .

The presumption must be, it seems to me, that if a job can be well done once, it should not be done twice. If one set of institutions is as capable of performing the task at hand as another, we should not ask both to do it. The challenge really runs the other way: if a proceeding is held to determine the facts and law in a case, and the processes used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding “count”? Why should we duplicate effort? After all, it is the very purpose of the first go-around to decide the case. Neither it nor any subsequent go-around can assure ultimate truth. If, then, the previous determination is to be ignored, we must have some reasoned institutional justification why this should be so.

Mere iteration of process can do other kinds of damage. I could imagine nothing more subversive of a judge’s sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else. Of course this does not mean that we should not have appeals. . . . What seems so objectionable is second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the “truth.” . . .

There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility. . . . I want to be careful to stress that I do not counsel a smug acceptance of injustice merely because it is disturbing to worry whether injustice has

been done. What I do seek is a general procedural system which does not cater to a perpetual and unreasoned anxiety that there is a possibility that error has been made in every criminal case in the legal system. . . .

Similarly, I resist the notion that sound remedial institutions can be built on the premise that state judges are not in sympathy with federal law. Again we must think in terms of tomorrow as well as today. Hopefully we will reach the day when the suspicion will no longer be justified that state judges—especially Southern state judges—evade their responsibilities by giving only the appearance of fairness in their rulings as to state defendants’ federal rights. The unification of the country is, after all, in progress; the day when Southern justice is like Northern justice, justice for the Negro like justice for the white, is no longer out of sight. And our remedial system ought to take account of this motion.

[Document Source: Paul M. Bator, “Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,” *Harvard Law Review* 76, no. 3 (January 1963): 442–443, 451–453, 524.]

Judge Henry J. Friendly, Dangers of Elevating Procedural Issues to Constitutional Claims, Ernst Freund Lecture at University of Chicago Law School, 1970

U.S. Court of Appeals judge Henry J. Friendly was a keen analyst of federal jurisdictional issues and proposed a number of ways to divert cases from the federal courts at a time when caseloads were rising rapidly. One of his primary targets was the increasing number of collateral attacks upon criminal convictions resulting from the Supreme Court’s expansive interpretation of habeas corpus. In particular, Friendly criticized the Court for elevating many procedural issues to the status of constitutional claims. The result, he believed, was to delay finality of justice and to deplete increasingly scarce judicial time and resources. In a 1970 lecture at the University of Chicago Law School, Friendly argued that the federal courts should not repeatedly review challenges to convictions based only on alleged procedural errors and should instead require petitioners to present a “colorable claim” of innocence.

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Legal history has many instances where a remedy initially serving a felt need has expanded bit by bit, without much thought being

given to any single step, until it has assumed an aspect so different from its origin as to demand reappraisal—agonizing or not. That, in my view, is what has happened with respect to collateral attack on criminal convictions. After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill's phrase, has not reached the end, or even the beginning of the end, but only the end of the beginning. . . .

Although, if past experience is any guide, I am sure I will be accused of proposing to abolish habeas corpus, my aim is rather to restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by current excesses. . . .

The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction. He would be surprised, I should suppose, to be told both that it never was really bad and that it has been steadily improving, particularly because of the Supreme Court's decision that an accused, whatever his financial means, is entitled to the assistance of counsel at every critical stage. His astonishment would grow when we told him that the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime. . . . The time is ripe for reflection on the right road for the future. . . .

A remedy that produces no result in the overwhelming majority of cases, apparently well over ninety per cent, an unjust one to the state in much of the exceedingly small minority, and a truly good one only rarely, would seem to need reconsideration with a view to caring for the unusual case of the innocent man without being burdened by so much dross in the process.

Indeed, the most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community—judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms. Today of all times we should be conscious of the falsity of the bland assumption that these are in endless supply. Everyone concerned with the criminal process, whether his interest is with the prosecution, with the defense, or with neither, agrees that our greatest single problem is the long delay in bringing accused persons to

trial. The time of judges, prosecutors, and lawyers now devoted to collateral attacks, most of them frivolous, would be much better spent in trying cases. To say we must provide fully for both has a virtuous sound but ignores the finite amount of funds available in the face of competing demands. . . .

The dimensions of the problem of collateral attack today are a consequence of two developments. One has been the Supreme Court's imposition of the rules of the fourth, fifth, sixth and eighth amendments concerning unreasonable searches and seizures, double jeopardy, speedy trial, compulsory self-incrimination, jury trial in criminal cases, confrontation of adverse witnesses, assistance of counsel, and cruel and unusual punishments, upon state criminal trials. The other has been a tendency to read these provisions with ever increasing breadth. The Bill of Rights . . . has become a detailed Code of Criminal Procedure, to which a new chapter is added every year. The result of these two developments has been a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis. . . .

Today it is the rare criminal appeal that does *not* involve a "constitutional" claim.

I am not now concerned with the merits of these decisions which, whether right or wrong, have become part of our way of life. What I do challenge is the assumption that simply because a claim can be characterized as "constitutional," it should necessarily constitute a basis for collateral attack when there has been fair opportunity to litigate it at trial and on appeal. . . .

It defies good sense to say that after government has afforded a defendant every means to avoid conviction, not only on the merits but by preventing the prosecution from utilizing probative evidence obtained in violation of his constitutional rights, he is entitled to repeat engagements directed to issues of the latter type even though his guilt is patent. A rule recognizing this would go a long way toward halting the "inundation;" it would permit the speedy elimination of most of the petitions that are hopeless on the facts and the law, themselves a great preponderance of the total, and of others where, because of previous opportunity to litigate the point, release of a guilty man is not required in the interest of justice even though he might have escaped deserved

punishment in the first instance with a brighter lawyer or a different judge. . . .

My submission, therefore, is that innocence should not be irrelevant on collateral attack even though it may continue to be largely so on direct appeal. To such extent as we have gone beyond this, and it is an enormous extent, the system needs revision to prevent abuse by prisoners, a waste of the precious and limited resources available for the criminal process, and public disrespect for the judgments of criminal courts.

[Document Source: Henry J. Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," *University of Chicago Law Review* 38, no. 1 (Fall 1970): 142–143, 145–146, 148–149, 155–157, 172.]

### Attorney General Richard G. Kleindienst, Support for Limiting Habeas Corpus, Letter to Emanuel Celler, June 21, 1972

Building on the insights of Paul M. Bator and Judge Friendly, among others, the Department of Justice drafted legislation to modify the statutory language governing habeas corpus. Under the DOJ proposal, petitions for habeas corpus would be allowed only where the prisoner could allege a constitutional violation that "involves the integrity of the factfinding process" and only if such violation had not already been raised on appeal in a state court. Attorney General Richard G. Kleindienst offered the Justice Department's endorsement of similar bills that were being considered by the House and Senate Judiciary Committees. In a June 1972 letter to U.S. Representative Emanuel Celler, Kleindienst emphasized that finality in criminal cases was indispensable to achieving justice and the rehabilitation of convicts.

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Collateral attack in the Federal courts on State and Federal criminal Judgments has become the ultimate outgrowth of the endless search for certitude in our criminal justice system. Americans, as a people, are well aware, and justly so, of the serious nature of an ultimate decision of a government, through its criminal justice system, to impose a final criminal sanction on a defendant. We hesitate, at that last instant before sending our convicted criminals to prison, and wonder if we have indeed "done justice." As a result of this laudable concern, however, we have countenanced a sys-

tem of collateral attack on these final criminal judgments which literally staggers the imagination. Issues of law, issues of fact relating to people, places, and things may all be raised and relitigated time and time again through the mechanism of collateral attack. Concern for the search for ultimate justice, however, must nevertheless at some point be met with the realization that at some time, at some place, the decision of someone must be regarded as conclusive. We are hopefully not so uncomfortable with or unsure of our system of criminal justice that we cannot bring ourselves to tell a defendant that at some point his conviction is final and not thereafter open to attack. Nearly 200 years of experience with what, for all its imperfections, is surely the most equitable system of justice ever conceived teaches us that at some point the interest in finality must be regarded as paramount.

There are two reasons why the system of collateral attack that exists today seriously impairs the operation of our system of criminal justice. A system that allows an endless inquiry into the finality of criminal judgments cannot but undermine any effort it makes to rehabilitate its criminals. In addition, that system will also be forced, in allocating available judicial time, to choose between the demands of the accused but not yet tried, and the demands of those already convicted.

Penologists seem virtually unanimous in their conclusions that speed and certainty of punishment, even more than its severity, are crucial factors in its efficacy as a deterrent to crime. . . .

We do not, of course, advocate a complete abolition of habeas corpus relief, but we think an examination of the history and the aims of our criminal justice system strongly suggests that rational reform of existing Federal habeas corpus practice is both desirable and necessary.

[Document Source: *Congressional Record*, 93rd Cong., 1st sess., 1973, 119, pt. 2: 2222–2223.]

Melvin L. Wulf, Importance of Habeas Corpus to Vindication of Constitutional Rights, *Brooklyn Law Review*, Fall 1973

Melvin Wulf of the American Civil Liberties Union offered an exhaustive rebuttal to the Department of Justice's argument in favor of restricting petitions for habeas corpus. While such restrictions

would ease caseload burdens in the federal courts, Wulf argued that the movement to curtail prisoner petitions was motivated in part by hostility toward Warren Court decisions expanding the procedural rights of criminal defendants and would make the enforcement of those rights more difficult. Wulf's argument for the liberal use of habeas corpus was also predicated on the Supreme Court's shrinking certiorari docket, as a result of which the Court was no longer a reliable forum for prisoners seeking to vindicate their constitutional rights. Habeas corpus petitions in the lower federal courts were necessary, he believed, to provide an alternative path for the assertion of these rights.

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In support of curtailed review, the Department of Justice lays great emphasis on its assertion that advocates of an expansive writ reflect an "endless search for certitude in our criminal justice system." However, a greater and more significant goal than certitude is recognition of civilized notions of fairness in criminal proceedings and the implementation of social policies embodied in the long line of decisions which define federal constitutional rights and provide for their enforcement. In none of this does anyone expect certainty, but only some relative degree of assurance that the various social policies are given an opportunity to work and that the criminal justice system works fairly. . . .

The judicial burden is another matter, for the statistics do establish that there has been a manifold increase over the last ten years in the number of post-conviction petitions filed in federal court by state and federal prisoners. But bare statistics do not tell the entire story, for, once closely examined, they are less of a burden than would appear. Assuming, however, that post-conviction petitions continue to be a burden on the courts, one must nonetheless contrast that burden upon judges' time with the social interests which underlie the entire scheme of federal post-conviction review, and contrast it also with the relative importance of other demands made upon the federal judiciary by other classes of cases. Even if one concedes that federal judges must now work under intolerable pressure, it might be more reasonable to consider restricting diversity jurisdiction, for example, than to restrict the scope of habeas corpus. . . .

The proponents of [prohibiting a habeas petition on a claim raised and determined by a state court] maintain that state prisoners may always seek review of adverse state court decisions by writ of certiorari in the Supreme Court of the United States. But that remedy is illusory. The Court's certiorari jurisdiction is discretionary and today more than ninety per cent of the petitions filed are denied. In the view of many, the Court has been overwhelmed by its heavy caseload, a situation which has led a study group appointed by the Chief Justice to make the radical proposal that a new mini-Supreme Court be set up to relieve the judicial burden. It is less than candid, therefore, to assert that state court prisoners have a remedy in the Supreme Court. They have only a small chance now of having a case heard there; if several thousand more petitions are channeled to the Court by these proposals, the probability of certiorari being granted in any single case will be reduced even further. It seems less than a perfect solution to the alleged overburden of district court judges to transfer their workload to an already heavily burdened Supreme Court. . . .

There is clearly some validity to the express rationale underlying the proposals issuing from the Department of Justice, *i.e.*, to improve the prospects for rehabilitation of prisoners and to save judges from a swelling burden of petitions. However, at the root of these proposals is the Department's traditional disapproval of the increased leniency toward those accused and convicted, expressed in various objections which have been made over the past decade to decisions of the Warren Court expanding the rights of defendants. Those objections have been made with special sharpness by the Nixon Administration and by prosecutors, police and state officials. Their special targets have been *Miranda v. Arizona*, *Mapp v. Ohio*, and *Wade v. United States*.

Though *Mapp*, *Miranda* and *Wade* cannot be reversed by statute because they are constitutional decisions, the same result could be achieved if they were somehow rendered unenforceable. These proposals achieve that objective by cutting off review of those procedural claims, among others, by federal courts on habeas corpus. By making federal court review almost unobtainable (except by the remote remedy of certiorari in the Supreme Court), the proposals invite the state courts, if not thoroughly to ignore *Mapp*, *Miranda*, *Wade*, and other decisions, at least to dilute



their effectiveness to whatever degree the state courts choose—a result that would be intolerable from any point of view. . . .

Those of us who take issue with the law-and-order attitudes . . . oppose easing the lives of judges by curtailing post-conviction review. If there is a burden, cut elsewhere or appoint more judges, or provide more professional assistance to judges, especially those who sit within the jurisdiction of large state prisons and therefore bear the brunt of prisoner cases. But it is simply mischievous and less than candid to advocate curtailment of fundamental constitutional rights on the ground that judges are overworked.

[Document Source: Melvin L. Wulf, "Limiting Prisoner Access to Habeas Corpus—Assault on the Great Writ," *Brooklyn Law Review* 40, no. 2 (Fall 1973): 254–256, 261–262, 265–266, 275.]

Alabama Chief Justice C. C. Torbert, Jr., Integrity of State Criminal Justice Systems, Testimony Before Senate Subcommittee on Courts of the Committee on the Judiciary, November 13, 1981

The proposals to restrict habeas corpus in the early 1970s did not receive substantial support in Congress. The Supreme Court under Chief Justice Warren Burger, however, began to pull back on its prior support for an expansive view of the writ. In the 1973 case of *Schneekloth v. Bustamonte*, for example, Justice Lewis Powell wrote a concurring opinion expressing the view that collateral review of a state prisoner's Fourth Amendment claim should be limited to whether there was a fair opportunity to raise and adjudicate that claim in state court.<sup>60</sup> The Court's majority adopted a similar position in 1976, ruling in *Stone v. Powell* that where a state court had fully considered a Fourth Amendment claim, a convicted defendant was not entitled to habeas corpus review in federal court.<sup>61</sup> The following year, the Court further restricted federal habeas corpus review, holding in *Wainwright v. Sykes* that such review was barred by the petitioner's failure to comply with a state law requiring that all motions to suppress evidence be made before trial.<sup>62</sup>

Efforts toward statutory reform of federal habeas corpus grew in strength when Ronald Reagan entered the White House and Re-

60. 412 U.S. 218 (1973).

61. 428 U.S. 465 (1976).

62. 433 U.S. 72 (1977).

publicans took control of the Senate in 1981. The Department of Justice, under Attorney General William French Smith, established the Task Force on Violent Crime, which counted habeas corpus reform among its primary goals. Further motivation for reform came as a result of a concurring opinion by Richard Posner, an influential judge of the U.S. Court of Appeals for the Seventh Circuit. In the 1982 case of *United States ex rel. Jones v. Franzen*,<sup>63</sup> Posner criticized the federal statute providing that facts found in a state proceeding would not be presumed correct, and would be reviewed anew in federal court, if the state proceeding was inadequate for any of several reasons. Posner called for reform to prevent the reexamination in federal court of facts found in state court proceedings.

Central to the renewed focus on habeas corpus in the early 1980s was the question of how extensive federal review of state court proceedings could be reconciled with the principles of federalism. During hearings on a bill introduced by Senator Strom Thurmond in response to Posner's opinion, C. C. Torbert, Jr., the chief justice of the Alabama Supreme Court, argued that state courts were equally capable of handling federal constitutional issues and that federal habeas corpus review undermined the integrity of state criminal justice systems.

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I want to make this statement to the subcommittee: one, that State courts do consider Federal constitutional issues; State courts are competent to deal with and decide these issues; State judges come from the same rank-and-file legal professionals from which Federal judges are selected; and, lastly, State courts ought to be trusted. . . .

It seems to me . . . that Federal habeas corpus reform . . . is necessary to insure the integrity of the criminal justice system in the country. Our criminal justice system is founded on federalism and one of its chief goals is finality. It is dependent upon public respect and support. All three of these essential pillars of our system are being impaired, and we need to do something to save the fundamental values of the criminal justice system.

When you talk about these issues you must focus attention on one obvious fact, and that is that the State court system, the pros-

63. 676 F.2d 261 (7th Cir. 1982).

ecution and defense functions, has the principal responsibility for the operation of the criminal justice system in the country. The U.S. Supreme Court has recognized this in a long line of decisions, that is the primacy of State government in this area, and yet it would appear to at least this one State court judge that an overextension of the use of habeas corpus has frustrated honest judges of the State courts who have ability and integrity. . . .

State appellate judges are as learned in the law as U.S. district judges, and it is frustrating to members of the State judiciary to see these matters reviewed—many, many years subsequent to final conviction—by one single member of the Federal judiciary.

In sum, the destruction of federalism through overextension of the writ of habeas corpus in recent years is not justified nor is it wise. . . .

The public has reason to question the basic integrity of a system that on the one hand espouses that swift and certain punishment is essential to protect society but on the other hand condones a dual system of appeal in which facts and legal issues are indeterminately litigated and never finally decided.

Now whether you monkey with the language and hear from the Department of Justice as the proper approach to the statute of limitations is not the real issue. The real issue in the case is that something must be done in order to restore a degree of confidence and support in our criminal justice system.

I want to emphasize that those of us who support Federal habeas corpus reform do not in any way depreciate the historical significance of the great writ or the importance of the legitimate purposes of the writ when it can and should serve, but overextension of the writ beyond any reasonable scope in recent years and the use of it in circumstances for which it was never intended will ultimately weaken both the writ itself and the criminal justice system in our country.

I think that the same Founding Fathers who expressly referred to the writ of habeas corpus in the Constitution also deliberately chose federalism as the basic governmental structure of this country, and they enshrined that choice in this great document no less than any other principle. The Founding Fathers knew, as we must realize, that no government system can function properly without the respect and support of its people.

For that reason, if our criminal justice system is to operate effectively and efficiently, indeed if it is to endure, we must restore some semblance of institutional sanity to the system.

[Document Source: U.S. Senate, Subcommittee on Courts of the Committee on the Judiciary, *Hearings on S. 653, A Bill to Amend Title 28 of the United States Code to Modify Habeas Corpus Procedures*, 97th Cong., 1st sess., November 13, 1981, 85–87.]

Larry W. Yackle, Necessity of Federal Oversight of State Criminal Justice, *Iowa Law Review*, May 1983

In 1982, Attorney General William French Smith submitted a proposed habeas corpus bill to the House and Senate along with a letter outlining the administration's objectives. Smith echoed the sentiments of state judges like C. C. Torbert, Jr., that federal collateral review of state court convictions was "unjustifiable," asserting that "federal habeas corpus procedures should reflect a scrupulous regard for the integrity of state procedures and an appropriate recognition of the state courts as trustworthy expositors of federal law."

Professor Larry W. Yackle of the University of Alabama Law School challenged the beliefs of Alabama's chief justice and Attorney General Smith regarding the obsolescence of federal habeas corpus review. Life-tenured federal judges had an essential responsibility, he argued, to supervise criminal convictions from state courts operating without such independence. He also pointed to the seeming reluctance of state criminal justice systems to enforce federal constitutional protections for criminal defendants under the Fourth, Fifth, and Sixth Amendments, with the result that such procedural safeguards would not be effective without federal oversight.

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I find the Reagan Administration's proposals objectionable on all counts and, frankly, consider them to reflect disappointment over battles lost in the 1940's. Fundamental, ideological hostility to the writ is plainly embraced by a new generation of critics. . . .

It is *not* true that the present framework for federal habeas review disrespects state procedures. The federal habeas courts are at pains to recognize legitimate state interests in the efficient processing of criminal cases. When the federal habeas courts decline to give effect to state procedural grounds of decision, it is usually to reach behind the miscues of counsel. It is widely acknowledged that most procedural defaults in criminal proceedings can be as-

cribed to defense counsel. If prisoners are bound by what their attorneys did, or failed to do, on their behalf, any examination of federal claims must be filtered through allegations that counsel rendered ineffective assistance. Federal habeas courts are able to cut through any confusion over counsel's mistakes and adjudicate underlying claims without simultaneously finding a sixth amendment violation. It might be preferable to address the matter forthrightly, in hopes of improving the quality of justice at the trial stage. The prospects for success on such a venture are, however, less than bright. Federal habeas corpus provides a short-fall guarantee against saddling blameless defendants with the consequences of counsel's inadequacies.

Nor is it true that federal claims may safely be left to the state courts, without federal supervision. Attorney General Smith neglects both history and present reality. Congress did not authorize the federal courts to issue the writ in behalf of state prisoners until 1867, when there was reason to doubt that state courts in the South could be trusted to enforce the post-Civil War amendments. Even so, the federal courts apparently did not begin to grant habeas relief after judgment until much later, perhaps as late as *Brown v. Allen*. By then, the Supreme Court had launched a campaign to restructure state criminal process on the federal model, as described in the Bill of Rights. Once again, there was concern that the state courts would prove recalcitrant. Accordingly, the Court recruited the federal habeas courts to ensure that the state courts complied with new, and unpopular, federal doctrines. The current system of postconviction review reflects, then, historical attempts to coerce the state courts into accepting federal doctrinal innovations to which they did not subscribe.

The need for federal habeas has not subsided. State judges, who must stand periodic election or answer to the public under some version of the Missouri Plan, cannot be as zealous in the protection of constitutional rights as life-tenured federal judges, who view federal claims in isolation from the inevitable attention in state court upon the guilt or innocence of the defendant. State judges act at their peril when they subordinate societal interests in convicting the guilty to the defendant's interest in procedural safeguards. Even if state judges were able to withstand public scrutiny and sustain meritorious constitutional claims, they would inevi-

tably arrive at inconsistent, albeit good-faith, judgments. Because the Supreme Court is physically unable to reconcile conflicting decisions from dozens of local jurisdictions, it would still fall to the federal habeas courts to achieve some measure of regional consistency. . . .

I suspect that if the state courts are improved, as Attorney General Smith insists they are, it is because of the continued existence of federal habeas corpus. State judges may look harder for meritorious claims if they know that the federal courts stand ready to find, and award relief on, claims that are overlooked or undervalued in the state forum. The functional merits of federal habeas are genuine and are not to be discarded in the name of maintaining psychological peace among recalcitrant state judges. Federal habeas corpus rests now, as it has for decades, on a quasi-constitutional principle . . . that persons convicted of crimes in state courts are entitled to at least one opportunity to litigate their federal claims in a federal forum. Since *Brown*, if not before, the federal writ has served as an effective vehicle for guaranteeing such a forum. The Supreme Court lacks the resources necessary to treat all or even many cases on direct review, and, therefore, the federal habeas courts have long served as functional surrogates. The asserted “right to a federal forum” in this context is more than ipse dixit. It is the bedrock of American criminal justice, and it has been for thirty years. The Great Writ is now what it was historically—an instrument of governmental administration. Within the field in which it operates, the writ orchestrates the distribution of decision-making authority between and among the various courts with subject matter jurisdiction to hear vital claims. Ultimate responsibility for the protection of individual federal claims is thus transferred from the state to the federal courts. It very much *does* matter, then, that a federal court might reach a decision different from that arrived at in state court, however “full” and “fair” the state court procedure. A genuine, serious, second look in federal court is part and parcel of the constitutional design.

[Document Source: Larry W. Yackle, “The Reagan Administration’s Habeas Corpus Proposals,” *Iowa Law Review* 68, no. 4 (May 1983): 612, 615–620.]

U.S. Department of Justice, Office of Legal Policy, Advocacy  
of Abolition of Federal Habeas Corpus Review of State  
Convictions, Report of May 27, 1988

In 1988, the Department of Justice's Office of Legal Policy issued a report advocating the total abolition of federal habeas corpus review of state criminal convictions. Such action would not present a constitutional problem, the report argued, because the writ as currently employed bore little resemblance to the traditional writ of habeas corpus, the suspension of which was limited by the Constitution. Rather than a bulwark against the use of executive power to imprison individuals arbitrarily, habeas corpus had become, in the words of the report, "a regular appellate mechanism . . . by which prisoners who have already been tried and convicted . . . can re-litigate in the lower federal courts the same claims that have been rejected at the various stages of adjudication and review in the state court systems." Both federalism and the importance of finality of criminal convictions required that this type of review be done away with, the report concluded. While the habeas corpus reform Congress enacted in 1996 did not go quite this far, it did place significant limitations on the use of federal habeas corpus review by state prisoners.

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Once habeas corpus has been transformed into a regular appellate mechanism . . . the result is an essentially redundant litigative process which imposes costs and strains that would not be tolerated in any other context. No legislature would pass a law stating that a defendant has a right to appeal, but that he may wait as long as he wishes before doing so. No legislature would pass a law stating that a defendant may appeal again and again if dissatisfied with the results the first time around. No legislature would pass a law stating that a defendant has a right to further mandatory review of a nearly unlimited range of alleged procedural errors that have already been thoroughly considered and rejected by other courts of appeals. Yet all of these characteristics can be found in the current federal habeas corpus jurisdiction. . . .

The "felt need" which habeas corpus has served in its historical and constitutional function is one of basic importance in any civilized system of justice. In its traditional character, it upholds the rule of law by ensuring that the government cannot detain a

person without specifying the charges against him and bringing him to trial on those charges.

In contrast, the current statutory “habeas corpus” remedy by which lower federal courts review state judgments is simply an attenuated appellate mechanism by which prisoners who have already been tried and convicted, and who have unsuccessfully appealed their convictions (often repeatedly), can re-litigate in the lower federal courts the same claims that have been rejected at the various stages of adjudication and review in the state court systems. This review jurisdiction of the lower federal courts in state criminal cases is a recent outgrowth . . . from a narrow statutory remedy created for completely different purposes in the Reconstruction era. It has no relationship in character or function to the Great Writ whose suspension is prohibited by the Constitution. They have nothing in common but a name.

The resistance to necessary reforms based on confusion between the current statutory “habeas corpus” remedy and the constitutional writ of habeas corpus is a depressing testament to the power of terminology to overpower substance and stifle intelligent reflection. Calling a decoy a duck does not make it fly. Calling the existing review jurisdiction of the lower federal courts over state judgments “habeas corpus” does not make it into the Great Writ of the Constitution and the common law.

Putting aside the erroneous identification of the current statutory remedy and traditional writ of habeas corpus, we see no reason to retain federal habeas corpus for state prisoners in its contemporary character. Mandatory review of claims that have been rejected in earlier appellate proceedings goes beyond any legitimate interest of fairness to defendants, and the absence of reasonable time limits and rules against repetitive application would be dismissed as absurd if suggested in connection with any other appellate mechanism. There is no reason to believe that preserving this extraordinary type of review yields any benefits that outweigh its very substantial costs to the interests of finality, federalism, and rational application of criminal justice resources.

As suggested by Attorney General William French Smith [in 1983], abolishing federal habeas corpus for state prisoners would be the optimum reform in this area. The Constitution allows this, because the “writ of habeas corpus” it safeguards is unrelat-



ed to the current post-conviction “habeas corpus” remedy, and because its prohibition of suspension of the writ creates no right to a federal court remedy for persons in state custody. State prisoners would continue to be able to secure review of their cases following such a reform through the appellate and collateral review mechanisms provided in state courts, and would also retain the traditional right to seek direct review by the Supreme Court.

[Document Source: U.S. Department of Justice, Office of Legal Policy, *Report to the Attorney General: Federal Habeas Corpus Review of State Judgments*, Truth in Criminal Justice Series No. 7, May 27, 1988, 40–41, 72–73.]

## *Sentencing Reform*

In response to concerns that sentencing for federal crimes was wildly inconsistent throughout the nation, Congress began serious consideration of sentencing reform in the 1970s. As part of the Comprehensive Crime Control Act of 1984, the Sentencing Reform Act established the United States Sentencing Commission, composed of both judges and non-judges appointed by the president and tasked with developing sentencing guidelines for all federal crimes. The guidelines, to be followed by judges except in extraordinary circumstances, were aimed at developing more uniform sentencing practices in the federal courts.

In the 1960s, the federal sentencing system was characterized by so-called indeterminate sentencing and an emphasis on the “rehabilitative ideal.” Judges possessed a great deal of discretion when handing down sentences to individual defendants, and the ultimate length of a prison term was determined by a parole board that evaluated an inmate’s progress toward rehabilitation. In addition, federal judges had broad discretion to suspend sentences or place defendants on probation for many crimes. The 1967 report of Lyndon Johnson’s Commission on Law Enforcement and Administration of Justice highlighted sentencing disparities and urged state legislatures as well as Congress to adopt clearer standards to guide judges.<sup>64</sup>

While the notion of sentencing reform became popular in the early 1970s, there were points of debate. Lawmakers and judges dis-

64. President’s Commission on Law Enforcement and Administration of Justice, *Challenge of Crime in a Free Society* (1967).

agreed on how a potential sentencing commission would be structured, both in terms of how many members would and would not be federal judges as well as whether the members would be appointed by the executive or the judiciary. Another point of contention was the degree to which any sentencing guidelines would constrain judicial discretion. Some judges and one senator spoke out in favor of preserving such discretion to the greatest extent possible, but they faced overwhelming opposition.

Senator Edward Kennedy of Massachusetts, who later became chair of the Senate Committee on the Judiciary, was one of the earliest and most notable campaigners for the reform of federal sentencing laws. His efforts were aimed at reducing incarceration and fostering consistency in sentencing as an anti-discrimination measure. Kennedy was heavily influenced by Judge Marvin Frankel of the Southern District of New York, whose 1973 book advocated the creation of a federal sentencing commission that would establish guidelines for judges to follow.<sup>65</sup> The notion of sentencing guidelines had broad bipartisan support, as both liberals and conservatives harbored a deep distrust of judicial discretion in this area. Senator Strom Thurmond of South Carolina, the ranking Republican on the Judiciary Committee and later its chair, became a strong ally of Kennedy's on sentencing reform.

Despite strong support in the Senate, opposition from the House Judiciary Committee prevented Congress from passing sentencing reform legislation in the 1970s. As crime rates increased in the late 1970s, the motivation behind sentencing reform changed. What had been conceived of as an anti-discrimination, anti-incarceration measure now had getting "tough on crime" as its central focus. Members of Congress argued that judges and parole boards were too lenient and that a lack of predictable and tough sentences was hindering the war on crime. When Ronald Reagan assumed the presidency in 1981, this political trend intensified. The bill passed by Congress and signed by Reagan in 1984 severely limited judicial discretion by making the guidelines mandatory rather than advisory (as Kennedy had originally intended) and completely eliminated parole from the federal system. Moreover, although the Sentencing Commission was designated an independent agency in the judicial branch, its members were to be

65. Marvin E. Frankel, *Criminal Sentences: Law Without Order* (New York: Hill and Wang, 1973).

appointed by the president and confirmed by the Senate rather than chosen by the Judicial Conference of the United States as some had proposed.

The Commission issued its final proposed guidelines in April 1987, and they became effective on November 1, 1987. According to the Commission, the guidelines reflected a focus on factors related to the offense in question, with the background and personal characteristics of the offender, other than criminal history, considered to be much less important.<sup>66</sup> The result of the implementation of the guidelines was an increase in the percentage of sentences that included prison time, and an increase in the average amount of time an offender spent in prison.<sup>67</sup>

Judge Marvin E. Frankel, *Advocacy for Sentencing Commission, Criminal Sentences: Law Without Order*, 1973

Judge Marvin Frankel was among the staunchest critics of sentencing procedures in the federal courts. As a result of the publication of his 1973 book, *Law Without Order*, Senator Edward Kennedy bestowed upon him the title of “father of sentencing reform.” Frankel proposed replacing the discretion of individual judges with sentencing guidelines drafted by a commission created by Congress.

Frankel objected to the broad discretion given to judges in sentencing, but he also resented indeterminate sentencing for placing too much responsibility in the hands of parole boards because of their supposed expertise in evaluating individual rehabilitation. The root of the problem, in Frankel’s view, was uncertainty in applying punishments—a problem that could be solved only by the creation of legal rules that would erase vast sentencing disparities and ensure that defendants convicted of similar crimes received similar punishments.

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[M]y first basic point is this: the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law. . . .

66. United States Sentencing Commission, *Guidelines Manual* (1987).

67. As mentioned above, the Supreme Court’s 1987 decision in *U.S. v. Booker* declared the guidelines to be advisory rather than mandatory.

The sentencing powers of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all. Everyone with the least training in law would be prompt to denounce a statute that merely said the penalty for crimes “shall be any term the judge sees fit to impose.” A regime of such arbitrary fiat would be intolerable in a supposedly free society, to say nothing of being invalid under our due-process clause. But the fact is that we have accepted unthinkingly a criminal code creating in effect precisely that degree of unbridled power. . . .

Until the last couple of years, the trend towards indeterminate sentencing has seemed irresistible. Just recently, from the prisons and elsewhere, some voices of dissent have been heard. I have come to believe that this minority position is sound and that indeterminate sentencing, as thus far employed and justified, has produced more cruelty and injustice than the benefits its supporters envisage. . . .

Vagueness and uncertainty in the law are (as I have urged earlier) *prima facie* evils, which does not mean they may never be tolerated, but does mean they call always for justification.

There is no sound justification for a general and uniform system of indeterminacy, and the use of this idea across-the-board has blocked or concealed the need for concrete justification in specific cases where indeterminate sentences may conceivably make sense.

In our easy adoration of expertise, we have given over power to people of dubious qualifications, subjected to little or no control.

We have subjected the supposed beneficiaries of the rehabilitative process to a hated regime of uncertainty and helplessness, ignoring that a program of “cures” thus imposed is doomed from its inception. . . .

[T]here is no valid reason for leaving to the individual judges their varying rules on what factors ought to be *material* [to sentencing] and to what effect. To say something is “material” means it is legally significant. We know what is legally significant by consulting *the law*. We do not allow each judge to make up the law for himself on other questions. We should not allow it with respect to sentencing. . . .

[S]uch things should be handled uniformly under legislative enactments.

Beyond codifying the numerous factors affecting the length or severity of sentences, an acceptable code of penal *law* should, in my judgment, prescribe guidelines for the application and assessment of these factors. While it may seem dry, technical, unromantic, and “mechanical,” I have in mind the creation eventually of a detailed chart or calculus to be used (1) by the sentencing judge in weighing the many elements that go into the sentence; (2) by lawyers, probation officers, and others undertaking to persuade or enlighten the judge; and (3) by appellate courts in reviewing what the judge has done. . . .

[T]here are huge needs for organized research and development in the field of sentencing. . . . There must be a commitment to change, to application of the learning as it is acquired. There must be recognition that the subject will never be definitively “closed,” that the process is a continuous cycle of exploration and experimental change.

Since we deal with the law, the normal agency of change is, increasingly, the legislature. But the subject of sentencing is not steadily exhilarating to elected officials. There are no powerful lobbies of prisoners, jailers, or, indeed, judges, to goad and reward. Thus, accounting in good part for our plight, legislative action tends to be sporadic and impassioned, responding in haste to momentary crises, lapsing then into the accustomed state of inattention. It follows that an effective program of research and development should ideally modify in suitable fashion the existing procedure for implementing experiments through change.

These thoughts about the long pull lead to my proposed “Commission on Sentencing.” . . . [T]his commission is meant to do much more than study and report, and it is tendered as the most important single suggestion in this book.

The proposed commission would be a permanent agency responsible for (1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules to which the studies pointed; and (3) *the actual enforcement of rules*, subject to traditional checks by Congress and the courts. . . .

[T]he commission would have the function of actually enacting rules—i.e., making law. This suggestion would presumably

generate controversy; legislators do not (and should not) lightly delegate their authority. Nevertheless, there is both precedent and good reason for delegating in this instance. As I have said, the subjects of sentencing, corrections, and parole are going to need ongoing study and an indefinite course of revision. Sweeping changes of policy, touching basic principles and institutions, will naturally remain for the legislature to determine from time to time. But relative details, numerous and cumulatively important, neither require nor are likely to receive from the legislature the necessary measure of steady attention. . . .

The uses of a commission, if one is created, will warrant volumes of debate and analysis. For this moment and this writer, the main thing is to plead for an instrumentality, whatever its name or detailed form, to marshal full-time wisdom and power against the ignorance and the barbarities that characterize the sentencing for crimes today.

[Document Source: Marvin E. Frankel, *Criminal Sentences: Law Without Order* (New York: Hill and Wang, 1973), 5, 8, 88–89, 112–113, 118–119, 122–123.]

### Senator Edward M. Kennedy, Proposal for Sentencing Reform, *Judicature*, December 1976

Senator Kennedy took the lead in steering sentencing reform through the Senate, and cosponsored a bill with conservatives Strom Thurmond and John McClellan in 1977. Kennedy's initial proposal was for advisory guidelines for judges to consult while also considering the defendant's personal history and the severity of the alleged crime. The guidelines, he believed, should be created by a sentencing commission that would be housed within the judicial branch and have its members appointed by the Judicial Conference.

In a *Judicature* article outlining his sentencing proposal, Kennedy discussed inconsistent sentencing as an infringement on fundamental fairness and a hindrance to the effective prevention of crime, because a lack of predictability in punishment weakened deterrence. Kennedy did not attack judges for the problem, but instead blamed legislators for failing to create guidelines embodying a clear and coherent rationale supporting sentencing policy.

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The federal code contains no list of criteria to be considered by the sentencing judge in deciding whether to impose a term of

imprisonment. The result has been chaotic—one judge may sentence in order to rehabilitate, another to deter the offender (or the potential offender) from committing a similar crime, a third to incapacitate and a fourth simply to “punish.” One judge may place a convicted defendant on probation, arguing that rehabilitation should never be a justification for imprisonment; another judge may justify a sentence of probation on the ground that “deterrence doesn’t work.” . . .

The absence in the federal criminal code of any articulated purposes or goals of sentencing has, unfortunately, led to a situation where different judges often mete out different sentences to similar defendants convicted of similar crimes, depending on the sentencing attitudes of the particular judge. . . .

The impact of such statistics on our criminal justice system is real and immediate. An important prerequisite of any effective crime-fighting program—certainty of punishment—is absent. In addition, the criminal justice system appears arbitrary and unjust, a game of chance in which the potential offender may “gamble” on receiving not just a lenient term of imprisonment but no jail sentence at all. Disparity encourages the white collar offender to commit crimes and gives the impression that justice is something different for the rich and the poor. It nurtures an already growing public cynicism about our own institutions, a cynicism which inhibits corrective action and stimulates others to cut corners and commit crime. . . .

Such sentencing disparity cannot be traced to “weak” judges who “coddle criminals.” The great majority of our federal judges perform their sentencing duties in a responsible and diligent manner. But these judges must act without any guidelines or review because Congress has never built any standards or safeguards into the sentencing process. Indeed, the federal criminal code invites disparity by conferring unlimited discretion on the sentencing judge to impose a sentence within wide statutory limits, ranging from probation to lengthy prison terms. . . .

I have introduced legislation in the United States Senate which would make long overdue reforms in the criminal sentencing process. . . .

The bill adopts the concept of imprisonment as *punishment*. Rehabilitation as a justification for imprisonment, as opposed to a beneficial side effect, is conspicuously absent. . . .

The concept of rehabilitation is grounded in the optimistic belief that criminals have simply “gone wrong” and can be “cured”, much as disease can be cured. But prison rehabilitation programs have not been successful—at least in those cases where such programs are compulsory in nature and are forced on the prisoner as a precondition of his release. . . .

The bill concentrates, therefore, on the other major justifications for imposing a term of imprisonment—incapacitation, specific deterrence, general deterrence and retribution. . . .

It is obvious that correcting the arbitrary and capricious method of sentencing will not eliminate our nation’s crime problem. . . .

But the shameful disparity in criminal sentences imposed in the federal courts is a major flaw which encourages the potential criminal to “play the odds” and, through luck and circumstance, “beat the system.” Sentencing disparity is unfair; it cannot help but have an impact on a prisoner who views his offense as no more reprehensible than that of another offender placed on probation after committing the same crime.

[Document Source: Edward M. Kennedy, “Criminal Sentencing: A Game of Chance,” *Judicature* 60, no. 5 (December 1976): 209–212, 214–215.]

Pierce O'Donnell, Michael J. Churgin, Dennis E. Curtis,  
Support for Establishment of a Sentencing Commission, *Toward a Just and Effective Sentencing System*, June 1977

Even before the major push for sentencing reform that began in the 1970s, the judicial branch was aware of the criticisms of disparities in sentencing and had taken some steps to address the issue. At the recommendation of the Judicial Conference, Congress in 1958 passed a law providing for the holding of periodic sentencing institutes throughout the country at which federal judges could meet to study and discuss sentencing issues. A number of judicial districts adopted sentencing councils, which enabled a sentencing judge to consult with two additional judges, each of whom had reviewed the case independently, before making a final sentencing decision.

From 1974 to 1975, Yale Law School held a workshop at which scholars, students, judges, and practitioners discussed sentencing issues and ultimately produced a proposed statute. Three participants—Pierce O'Donnell, Michael Churgin, and Dennis Curtis—authored a book arguing in favor of the proposed statute. The authors addressed existing innovations but found them insufficient to resolve the problem of sentencing disparities, as they relied upon



conversations between a limited number of judges. They proposed instead that all judges be guided by principles that were determined by a sentencing commission.

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Even assuming that [sentencing] institutes significantly reduce sentencing disparity, the larger question is whether we should rely on discussions among judges for the evenhanded application of the criminal law. . . . Our ideal of equal justice is better served by requiring judges to apply rational sentencing principles equally to similar offenders than by hoping that institute-trained judges will consistently apply whatever majority rule emerges from the institute. The latter approach not only still smacks of arbitrariness, but also makes no provision for articulation of the reasons for which the sentence was imposed or for appellate review, two major facets of our proposed sentencing system.

The second response to sentencing disparity has been the development of multijudge sentencing councils. Under the usual council agreement, three judges receive in advance the pre-sentence report on a particular offender. Each judge studies and prepares his own recommendation chart, which embodies his recommended sentence and accompanying reasons. Prior to the sentencing hearing, they discuss the sentence each feels is best suited for the offender. The judge originally assigned to the case retains sole responsibility for the imposition of sentence, and he may heed or ignore the recommendations of his two colleagues in fixing the punishment. . . .

Some criticisms levied against the sentencing council practice, such as impairment of the sentencing judge's ability to consider oral argument at the sentencing hearing after having heard the views of the advisory judges, are mechanical in nature and appear capable of resolution. The paramount question for purposes of meaningful reform, however, is whether the council can reduce significant sentence disparity. The council procedure offers no such assurance, because the original judge is free to apply his own sense of justice, regardless of the opinions of his colleagues. Moreover, the procedure assumes that three judges acting together will be better able to discern rational sentencing principles than one, which may or may not be true. The disparity evident among judges of the Eastern District of New York, where

these councils regularly are used, casts doubt on the theory that councils tend to generate common sentencing approaches among the participating judges of a district. Finally, while the council offers the possibility of reducing sentencing disparity among the judges of the particular district, it cannot reduce disparity among the 94 federal districts.

It is more sensible to establish uniform sentencing criteria that all federal judges are required not only to apply but also to explain how and why they were applied. Only in this way can an offender understand why society is depriving him of his liberty and how he can better conform his behavior to societal expectations. One judge properly guided by the provisions of the proposed statute can achieve equal justice better than three judges groping without standards.

[Document Source: Pierce O'Donnell, Michael J. Churgin, and Dennis E. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* (New York: Praeger Publishers, 1977), 17–18.]

Judge David L. Bazelon, Value of Judicial Discretion in Sentencing, Speech to Conference on Crime and What We Can Do About It, April 2, 1977

Despite growing support for uniformity in sentencing, some federal judges spoke out in defense of judicial discretion and the tailoring of sentences to individual defendants. In a 1977 speech at the Conference on Crime sponsored by the Center for the Study of Democratic Institutions, Judge David Bazelon of the U.S. Court of Appeals for the District of Columbia Circuit defended rehabilitation as a goal of sentencing and cautioned that “mechanical” sentencing practices would not serve justice. As later critics of sentencing guidelines pointed out, Bazelon warned that a system based on guidelines would shift a great deal of discretion from the judge to the prosecutor. Bazelon acknowledged that discretionary sentencing was flawed, but he believed that the best solution was to compel judges to be more forthcoming in explaining their sentencing choices, thereby creating greater transparency and leaving a detailed record for appellate review.

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[T]here are growing numbers of criminologists and politicians who are promising society great victories in the war on crime by

changing our sentencing policies. They speak of flat sentences, uniform sentences, mandatory sentences, presumptive sentences. Under one proposal, a new sentencing commission would set standards, and appellate courts would review sentencing decisions to ensure those standards are implemented.

Some of these proposals come from those who have given up on rehabilitation, and indeterminate sentencing, which uses the unfixed release date to induce prisoners to reform themselves. Since prisons now seem to serve no purpose but punishment and isolation, they say, there is no reason that like crimes should not receive like sentences. These people rest their case for uniform sentences on fairness for prisoners themselves, who are too often kept ignorant of their release date or subjected to unequal treatment. . . .

I still cling to the ideal of individualized justice. . . . I fear that if we shift from concern for the individual to mechanical principles of fairness we may cease trying to learn as much as possible about the circumstances of life that may have brought the particular offender to the bar of justice.

At present, sentencing discretion is shared by prosecutors, judges, parole boards, and others. Uniform and mandatory sentencing would merely transfer most of this discretion to prosecutors, who would in effect set sentences by their decisions about whom to charge with what crime and whether to plea bargain. Since prosecutors need not reveal their reasons, their exercise of discretion is not reviewable.

Of course, keeping discretion in judges' hands is preferable only if judges explain their decisions and make themselves accountable to the public. Sentencing discretion cannot appear fair or serve justice or teach anyone anything unless its exercise is fully explained. Unfortunately, most judges now give only boilerplate reasons for their sentencing, if that. I would guess that some judges—those who are moved by retribution and vengeance—would be ashamed to say so forthrightly. Others suppose there must be right and wrong sentences, so they are embarrassed to reveal their understandable dilemma in not knowing one from the other. And finally, there are those who can't be troubled; if they bothered to probe their own minds, who knows what useful insights or disturbing biases they would find?

All the proposals for sentencing reform are worthless unless trial judges clearly and honestly reveal in writing the reasons for the sentence imposed. Without such reasons, no review—judicial or otherwise—would have any basis for determining whether the judge abused his sentencing discretion. And without reasons, we would be denied the experience which would be essential for fixing sentencing standards and guidelines by any court, commission or legislature.

[Document Source: *Congressional Record*, 95th Cong., 1st sess., 1977, 123, pt. 11:13223.]

Senator Charles McC. Mathias, Jr., Opposition to Sentencing Reform Bill, U.S. Senate, Speech of January 27, 1984

Sentencing reform received overwhelming support in the Senate and passed with only a single nay vote in both 1982 and 1984. The lone dissenter was Republican senator Charles Mathias of Maryland. On the floor of the Senate, Mathias pushed for amendments that would have strengthened the role of the Judicial Conference in appointing the new sentencing commission and would have preserved the ability of judges to consider sentences that departed from the guidelines.

Mathias's remarks on sentencing reform turned out to be quite prescient, anticipating criticisms that gained prominence in the decades following. He warned that the "tough on crime" rhetoric would lead to a surge in the federal prison population and that the sentencing reforms under consideration would accelerate that trend. Mathias predicted that the bill would strengthen the private prison industry and impose unacceptable social and fiscal costs.

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I think there is, again, no disagreement that there is too much disparity and too much indeterminacy. But disagreement arises with respect to the best way to reduce the disparity and the indeterminacy. I would have to offer it as my humble and respectful opinion that the solution provided by title II is illusory. It would replace today's unstructured sentencing practices with an inflexible and potentially very costly guideline system.

The Federal judges and the U.S. Parole Commission are two of the most visible actors in the current sentencing system. Not surprisingly, therefore, they are the targets of this bill. The bill would

abolish the Commission and it would consign the judges to the task of operating a sentencing decision machine designed and built by someone else.

I have to say that one of my problems with title II is the fact that I read in it a profound mistrust of the Federal bench. I would like to be wrong on this—perhaps I shall be corrected in the course of debate. . . . It is an attitude which assumes that Federal judges, acting through the Judicial Conference, would be unwilling or unable to draw up sentencing guidelines even if they were instructed to do so by the Congress of the United States.

It seems to me that title II further assumes . . . that Federal judges would not conscientiously apply voluntary guidelines but, instead, must be stripped of their traditional sentencing discretion and instructed to adhere to preordained guidelines except in the most extraordinary circumstances.

All of this seems to me to overlook the obvious, that the co-operation of the bench is an essential ingredient of any effective sentencing reform.

The Judicial Conference is skeptical about this bill. The committee has rejected the sensible alternatives that the judges have proposed. We thus have a climate which does not augur well for the success of this experiment.

I think we should recognize that simply drastically reducing judicial discretion in sentencing, as title II proposes to do, will in no way eliminate discretion from the system. It will merely displace discretion from the courtroom, where it is now exercised before God and the company assembled there, where it is now exercised under the scrutiny of the press and the public, and relegate it to other venues. . . .

I seriously doubt that the public will be better served when instead of reposing responsibility in a U.S. district judge, approved by the Attorney General of the United States, nominated by the President of the United States, and confirmed by the U.S. Senate, there will be a kind of collective responsibility exercised by the U.S. attorney, by the probation officers, and by the members of the Commission. All of these people will become responsible, and therefore as is the human experience with collective responsibility that really means none of these people will become

responsible for the sentence imposed on a Federal criminal defendant.

I think we have to recall that the Sentencing Commission's responsibilities will not end with the creation of the sentencing guidelines because this is a new bureaucracy. This bill is not only a budget buster, it creates new bureaucracy. This new bureaucracy will be empowered to promulgate regulations on a vast array of issues which today are confided to judicial discretion.

There is no evidence that the Federal bench is incompetent to decide questions such as when sentences should be modified on humanitarian grounds. So there is no justification for the powers which the bill would give to the Sentencing Commission in these collateral areas. I think it is ironic that some of the Senate's most vociferous foes of big government and of unbalanced budgets have lent their support to this proposal to create yet another Federal bureaucracy with a sweeping charter to impose solutions for problems that have not been proved to exist. . . .

I cannot see that the bill would do anything to reverse that alarming trend toward more and more indiscriminate use of incarceration in the Federal prisons which are already bulging with the highest prison population in history . . . .

The report accompanying the bill professes neutrality toward the appropriateness of incarceration. The committee rejected an amendment which would have required the imposition of the least severe appropriate sanction in each case and the committee also refused to direct the sentencing commission to design its guidelines to avoid increases in the prison population or in the average sentence served by Federal prisoners. . . .

[T]he proponents of this legislation should reconsider the need to build in the safeguards which will protect against the fiscal and social costs of over-reliance on incarceration. If there is any Member of the Senate who thinks that I may be exaggerating this possibility, I suggest that they merely look at the most concrete evidence that I can think of. I use "concrete" not as a figure of speech but as a noun, because there are today private corporations going into the prison business. Private corporations are pouring concrete and building prisons which they intend to rent to Government as a profitmaking enterprise because they see the growth of the prison population. They see that this is a need, they

want to get in on the action, and they are pouring the concrete today.

When you have private corporations planning to enter the business of housing prisoners for profit, it seems to me the Senate wants to take a very careful look at the projections of the size of the prison population. Anticrime rhetoric we all love to utter. Everybody is against crime, and we like to make the speeches to prove it. But anticrime rhetoric for consumption today seems to me to be more evident in this bill than the prudent planning that is necessary to minimize the burden on tomorrow's taxpayers.

[Document Source: *Congressional Record*, 98th Cong., 2nd sess., 1984, 130, pt. 1:709–710.]

Senator Charles McC. Mathias, Jr., Proposed Amendments to Sentencing Reform Bill, U.S. Senate, Speech of January 31, 1984

A few days after speaking on the Senate floor about his general misgivings regarding the sentencing reforms under consideration and the extent to which they would strip judges of discretion, Senator Mathias took to the floor once more to speak in favor of his proposed amendments to the bill. Specifically, the senator wished to replace a sentencing commission that, while part of the judicial branch, would have its members nominated by the president and confirmed by the Senate, with one that would be a part of and have its members appointed by the Judicial Conference. In addition, while the pending bill provided that at least two members of the commission were to be federal judges, Mathias's proposed amendment would have increased that number to four. Lastly, Mathias wished to remove from the bill many of the detailed congressional mandates with which the commission would be required to comply, which included the issuance of policy statements on matters such as probation, post-release supervision, and prison furloughs and transfers. The final version of the Sentencing Reform Act did increase the number of judges on the commission to three, but none of Mathias's proposed alterations came to fruition.

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The Judicial Conference is a body in being. We know what it looks like; we know what its membership is; we know its track record. We can make some projections as to what its course of

operation would likely be. The proposed sentencing commission is, of course, an entirely unknown quantity. Besides imposing the responsibility for drawing up the sentencing guidelines on the Judicial Conference, the amendment would also focus the guidelines on the sentencing decision. It would simplify the guidelines primarily by eliminating most of the detailed instructions to the Sentencing Commission as contained in S. 1762. . . .

The scope of the guidelines would be narrowed to focus exclusively on sentencing rather than on peripheral matters such as the grounds for sentence modification or standards for prison furloughs or transfers, and all the other issues that are contemplated in Senate bill 1762. . . .

The underlying premise of this amendment is very simple, and that is that judges are going to administer the guidelines. After all, the purpose of the guidelines, regardless of who writes them, is to help judges do their job.

We have to ask, why should we exclude judges from the process or give them only minimal representation until the guidelines are totally drafted?

I further have to ask the question, is such a system likely to work? Does it make any sense to present the bench with a fait accompli and tell the judges, “go on and administer the guidelines that have been drawn up for you”? Would it not be more sensible to enlist the skill, experience, knowledge, and cooperation of the judges in the first place? . . .

If I am wrong, that is, if the judges do not write the guidelines that we in Congress would expect that they should, or if we do not like what they have written, then the Congress has an opportunity either to change it or to say at that point, “the judges are hopeless and we should create a new bureaucracy called a sentencing commission.”

But I think we should first try with the extraordinary intellectual resources that are available in the Judicial Conference before we conclude that judges are not up to the job and that a permanent new agency is needed to supplant one of the integral functions of the bench.

In this debate, we generally refer to the guidelines developed by the sentencing commission as sentencing guidelines, but in fact they cover far more than simply the initial sentencing deci-



sion. The sentencing commission will have far more power and far greater responsibilities than the name would imply. I think Senators should be fully aware of that. . . .

The bill also imposes on the Sentencing Commission the duty to follow a long series of congressional mandates. With all due respect to Senators and Members of the other body, these mandates are somewhat [confusing] and in some cases contradictory. . . .

Compared to the provisions of the bill which invite the establishment of an entrenched bureaucracy within the Federal criminal justice system, the structure proposed by my amendment is a model of simplicity.

[Document Source: *Congressional Record*, 98th Cong., 2nd sess., 1984, 130, pt. 1:973–974.]

Senator Edward M. Kennedy, Opposition to Proposed Amendments to Sentencing Reform Bill, U.S. Senate, Speech of January 31, 1984

Senator Kennedy, the main sponsor of the sentencing reform bill under consideration, opposed Senator Mathias's proposed amendments in strong terms. He referred to sentencing in the federal courts as "a national disgrace" and asserted that judges alone could not solve the problem without strong participation from Congress. Kennedy pointed out that under the proposed bill, judges would have representation on the commission, but that a wide variety of other perspectives was needed as well.

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I take strong exception to the amendment of the Senator from Maryland and to his arguments in support of his amendment. . . .

[T]o underline a point that has been made time in and time out, the sentencing procedures in this country are a national disgrace. . . .

There are many citizens in this Nation who have seen situations in which individuals have received widely disparate sentences for identical crimes. In our Committee on the Judiciary, we have heard from people who have been involved in the sentencing process and sentencing procedures, who have been the perpetrators of crimes, who have served time in Federal penitentiaries, who talk about the system of roulette which exists within the criminal

underworld, where the criminals themselves and the defense attorneys understand all too well that if they go before X judge they get a heavy sentence and if they go before Y judge they get a lenient one. . . .

With all due respect to the Judicial Conference, the judges themselves have not been willing to face this issue and to make recommendations and to try and remedy the situation.

The recommendation of the Senator from Maryland to have a part-time Commission made up of judges who are occupied in other endeavors is not going to answer the problem.

We need a full-time Commission made up of judges, prosecutors, victims of the crimes, senior citizens who are too often the victims of the crimes, and others experienced in law enforcement to develop sentencing guidelines. The Sentencing Commission needs an independent staff to assist in the consideration of the wide range of different issues that are involved in sentencing and sentencing guidelines, such as the availability of penal institutions, the situation of crowding in penal institutions, and the interest of the public in certain crimes. Certainly the American people are entitled to have the Senate and Congress establish the framework and articulate the policy considerations for Federal criminal sentencing. Under this legislation, Congress will not just let the Sentencing Commission go unattended or unobserved but will review the Commission's recommendations, and examine the sentencing guidelines before they go into effect. The proposal contained in this bill is the most responsible way of addressing criminal sentencing, an extremely important element of the criminal justice system which is in complete and utter disarray.

[Document Source: *Congressional Record*, 98th Cong., 2nd sess., 1984, 130, pt. 1:975.]

## Civil Justice Reform and Access to the Courts

Policymakers debated and implemented several significant reforms of the federal civil justice system between the 1960s and the 1990s. Many of these proposals emerged from a common source: widespread anxiety about rapidly growing caseloads and the increased complexity of civil litigation, both of which were increasing the burdens of the federal courts. Chief Justice Warren Burger spoke for those who feared the courts would be overwhelmed when in his 1977 remarks to the American Bar Association, he spoke of the “inherently litigious nature of Americans” and deplored “a notion that traditional litigation . . . is the cure-all for every problem that besets us or annoys us.”<sup>68</sup>

Not all policymakers agreed with Burger’s assessment, however. Proposed reforms aimed at easing the workload of the federal courts faced objections from lawmakers and members of the legal community who felt that the potential changes would unduly limit access to federal justice for civil litigants. Some reformers wished to expand, rather than restrict, access to the courts. As a result, policy debates focused on concerns much broader than the proper handling of specific types of federal litigation and led to discussions of the fundamental purpose of the federal courts and the role they were to play in society. These discussions illustrated that there was no such thing as a purely procedural reform. Instead, every attempt to make technical changes to the operation of the courts had the potential to bring about far-reaching and substantive effects on the courts’ ability to provide justice to the American people.

One such proposed reform was to curtail, or perhaps even eliminate, diversity jurisdiction—federal court jurisdiction based on the parties being citizens of different states. Those who supported dispensing with diversity jurisdiction pointed out that not only would it greatly reduce federal court caseloads, but the change would also leave cases dealing only with state law to the state courts. Attorneys for poor citizens seeking to vindicate federal rights especially favored

68. Warren E. Burger, “Let’s Stop Building Major Cases Out of Minor Disputes,” *Bar Leader* 3, no. 2 (September–October 1977): 2.

the proposal, because it would reduce competition for scarce judicial resources and allow more of their clients through the courthouse door. Defense attorneys, however—particularly those representing corporations—felt that diversity jurisdiction was still needed for its original purpose of protecting parties from local prejudice in the state courts. They believed their clients, if sued in the courts of another state, should have the option to remove the case to what they considered a more impartial federal forum.<sup>69</sup>

Two other debates were spurred by the increasing size and complexity of cases filed in federal court. After a 1966 revision of the Federal Rules of Civil Procedure facilitated the filing of more class-action lawsuits, there was significant backlash in part because of the strain these large and complicated cases were putting on the federal courts. Those who supported maintaining widespread access to federal class-action litigation argued that such cases were the only mechanism individual citizens had to hold corporations accountable for harmful conduct; defense attorneys, however, saw class actions primarily as a way for plaintiffs' lawyers to solicit litigation in the hopes of earning large fees, often by pressuring defendants to settle cases rather than risk massive damage awards. As with other proposed reforms, the debate over class actions ultimately came down to the question of which types of cases, and which parties, should have access to federal courts.<sup>70</sup> The Class Action Fairness Act of 2005, the first major legislative revision of class-action rules since 1966, came down on the side of expanded access to federal courts.<sup>71</sup> In a reversal of earlier class-action debates, expanded jurisdiction was favored by corporate defendants, who believed they had been treated unfairly in state courts.

69. For historical background on diversity jurisdiction and its declining importance in the mid-twentieth century, see Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958* (New York: Oxford University Press, 1992); and Posner, *supra* note 1. For a discussion of diversity jurisdiction in the latter half of the twentieth century, see James M. Underwood, "The Late, Great Diversity Jurisdiction," *Case Western Reserve Law Review* 57, no. 1 (Fall 2006): 179–222.

70. For further reading on the history of class-action reform, see David Marcus, "The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980," *Washington University Law Review* 90, no. 3 (2013): 587–652.

71. Class Action Fairness Act of 2005, 119 Stat. 4 (2005).

The other reform proposal that targeted large and complex litigation was the Judicial Panel on Multidistrict Litigation (JPML). The JPML was a panel of federal judges established in 1968 for the purpose of consolidating pretrial procedures in multiple cases based on common facts and transferring them to a single district, before transferring them back to their original districts for trial.<sup>72</sup> Supporters of the JPML saw it as a modern and efficient way of dealing with the phenomenon of similar cases being filed in districts across the country, thereby reducing the burden on the federal courts. Detractors, however, saw the panel as depriving litigants of their chosen forum for the often crucial pretrial process and as potentially harming the quality of justice by subjecting parties in multiple cases to one-size-fits-all pretrial orders and to having different judges handle the pretrial and trial aspects of litigation.<sup>73</sup>

Perhaps the most significant civil litigation reforms of the second half of the twentieth century were those involving settlement and alternative dispute resolution. As caseloads grew, many involved with the judicial system looked for ways to ease the burden on the courts by bringing cases to speedier conclusions or diverting cases away from the courtroom entirely, contributing to the phenomenon later called the “vanishing trial.”<sup>74</sup> Rule changes gave federal judges more influence over the pretrial process, particularly by encouraging settlement before the parties engaged in extensive and costly discovery. The courts also adopted alternative dispute resolution methods such as arbitration and mediation in an attempt to steer some cases—particularly those involving small claims—away from traditional litigation and toward a faster and less expensive method. These reforms had their critics as well. Some saw them as reducing access to the courts for poor and middle-class litigants and weakening the judiciary’s com-

72. An act to provide for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact, and for other purposes, 82 Stat. 109 (1968).

73. More background on the origins of the JPML can be found in Andrew D. Bradt, “A Radical Proposal: The Multidistrict Litigation Act of 1968,” *University of Pennsylvania Law Review* 165, no. 4 (March 2017): 831–916.

74. The term *vanishing trial* came into common usage following a 2002 article by attorney Hope Viner Sanborn. “The Vanishing Trial,” *American Bar Association Journal* 88, no. 10 (October 2002): 24–27.

mitment to its core functions: adjudicating disputes and enforcing federal rights.<sup>75</sup>

The civil justice reform proposals debated during the mid- to late twentieth century were all aimed in some way at reducing the caseload burdens on the federal courts. All of the reforms, however, raised fundamental questions that went far beyond issues of speed, efficiency, and cost. Judges, lawyers, legislators, and others grappled with the purpose and role of the federal courts and the true meaning of access to justice. Debates focused on which cases and which litigants properly belonged in federal courts and which were to be diverted elsewhere. The allocation of scarce judicial resources could not be accomplished, policymakers found, without making value judgments to determine which disputes should be resolved through traditional litigation before an Article III judge and which could fairly be resolved by other means without depriving the public of justice.

## *Diversity Jurisdiction*

Since their inception, federal courts have had jurisdiction over disputes between citizens of different states, commonly known as diversity jurisdiction. Article III of the U.S. Constitution included these controversies within the judicial power of the United States, and in the Judiciary Act of 1789 Congress granted the circuit courts jurisdiction, concurrent with the state courts, over cases “between a citizen of the State where the suit is brought, and a citizen of another State,” provided more than \$500 was in dispute. Giving federal courts the power to resolve cases based only on state law was controversial, and led to frequent debate about the role of the federal courts in protecting litigants from potential prejudice in state courts and about the proper balance between state and federal jurisdiction.

During the late nineteenth and early twentieth centuries, Congress debated various proposals to limit or abolish diversity jurisdiction. Those in favor of such a plan objected in particular to the ability of business corporations to force plaintiffs into distant and allegedly business-friendly federal courts. In the latter half of the twentieth century, the movement to curtail diversity jurisdiction gained steam

75. For a general discussion of alternative dispute resolution in the federal courts, see Posner, *supra* note 1.

again, partly because of rapidly rising caseloads. Many federal judges, including the members of the Judicial Conference of the United States, saw the abolition, or at least the restriction, of diversity jurisdiction as a necessary remedy for the demands being placed upon the federal courts.

The debate over diversity jurisdiction after World War II involved competing notions about the role of the federal courts in an era in which the federal government was increasingly involved in regulating the economic and social life of the nation. Since the Supreme Court's 1842 decision in *Swift v. Tyson*, federal district courts had not been bound to follow the common law of the states in which they sat. As a result, for almost a century, the federal courts had crafted and applied in diversity cases an interpretation of state law that departed from that of the state courts, creating what amounted to a federal common law. In 1938, the Supreme Court overruled *Swift* with its decision in *Erie Railroad v. Tompkins*, which held that federal courts must follow state court interpretations of state law. By reducing the incentive for corporations to seek what they believed would be a more hospitable federal forum, the *Erie* decision became an important catalyst for proposals to abolish diversity jurisdiction.

In the wake of *Erie*, legal academics such as Herbert Wechsler, director of the American Law Institute (ALI), sought to establish a principled division of labor between state and federal courts, arguing that state courts were best suited to deciding cases that turned on state law. By the late 1980s, the official position of the Judicial Conference was that diversity jurisdiction should be abolished; judges argued that the fears about local bias that led to diversity jurisdiction at the founding were no longer justified, especially when the burdens on federal judicial resources were mounting.<sup>76</sup>

76. In the 1980s and beyond, federal lawmakers displayed a general preference for federal question jurisdiction over diversity jurisdiction. For example, Congress expanded federal question jurisdiction in 1980 by eliminating the amount-in-controversy requirement for that category of cases (94 Stat. 2369 (1980)). In 1990, Congress provided for the exercise of supplemental jurisdiction over claims "so related" to claims over which the courts had original jurisdiction "that they form part of the same case or controversy." The statute applied broadly to federal question cases but denied its application to several categories of claims in diversity cases when the exercise of such jurisdiction "would be inconsistent with the jurisdictional requirements" of the diversity statute (104 Stat. 5113 (1990)).

Diversity jurisdiction continued to have its defenders, however. Trial attorneys and corporate counsel asserted that the protection from bias that the framers provided by allowing broad access to the federal courts was still needed and should not be jettisoned. Despite a flurry of proposals between 1977 and 1988, Congress failed to pass legislation dramatically curtailing diversity jurisdiction, with the only significant changes being a 1988 statute raising the minimum amount in controversy from \$10,000 to \$50,000 and a further increase to \$75,000 in 1996.<sup>77</sup>

### American Law Institute, Support for Curtailing Diversity Jurisdiction, Draft Report of September 25, 1965

Congress attempted in 1958 to slow the growth of diversity filings by raising the minimum amount in controversy from \$3,000, where it had stood since 1911, to \$10,000.<sup>78</sup> Private civil filings in the federal courts dropped from 45,657 in 1958 to 37,445 the following year, but Chief Justice Earl Warren was not confident that the trend could be sustained without further changes.<sup>79</sup> Warren advocated that the American Law Institute conduct a comprehensive study of federal jurisdiction to determine what types of cases were “appropriate” for the federal courts as opposed to state courts. Such a study, he believed, would lead to a realignment of jurisdiction according to the “basic principles of federalism.”<sup>80</sup>

Herbert Wechsler, a law professor at Columbia University and the director of the ALI, had long championed an adherence to the separation of powers, judicial restraint, and the ideal of state and federal courts exercising authority within their own delimited spheres. Under his leadership, the ALI took up Warren’s challenge to examine federal court jurisdiction and dedicated a decade to producing the *Study of the Division of Jurisdiction between the State and Federal Courts*. A draft of the report released in 1965 stopped short

77. Judicial Improvements and Access to Justice Act, 102 Stat. 4642 (1988); An act to make improvements in the operation and administration of the Federal courts, and for other purposes, 110 Stat. 3850 (1996).

78. An act amending the jurisdiction of district courts in civil actions with regard to the amount in controversy and diversity of citizenship, 72 Stat. 415 (1958).

79. Caseload data for the U.S. district courts is available on the FJC website at <https://www.fjc.gov/history/courts/caseloads-civil-cases-private-1873-2016>. Data for the period in question was taken from the *Annual Report of the Director of the Administrative Office of the U.S. Courts* for each respective year.

80. American Law Institute, *36th Annual Meeting* (1959), 33.



of calling for abolition of diversity jurisdiction but did recommend limiting it.<sup>81</sup> While much was made of the effect that curtailing diversity jurisdiction would have on alleviating caseload pressures, the ALL report emphasized that its primary focus was Warren's call for an allocation of jurisdiction between the federal government and the states that was more reflective of federalist ideas.

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There should be stated at the outset the firm premise of the Reporters that access to the federal courts because of the diversity of citizenship of the parties should be permitted only upon a showing of strong reasons therefor and only to the extent that these reasons justify. . . . It would be preferable to see the use of the federal courts concentrated upon the adjudication of rights created by federal substantive law. In such adjudication the federal courts speak with the authority which they lack in diversity cases since *Erie R.R. v. Tompkins* . . . and can thus exercise the creative function which is essential to their dignity and prestige. . . .

It has been indicated that the original central justification for diversity jurisdiction lay in the prejudice or reasonable fear of prejudice against outsiders from other states or, in broader terms, the lack of confidence in the adequacy of state court justice. If general diversity jurisdiction is to be retained, it must be because these basic reasons for it continue to have validity. The incidental nationalizing functions . . . served by this jurisdiction, however important they may have been historically, plainly have no present relevance to the problem. . . .

First, as to the matter of prejudice, the conventional justification for general diversity jurisdiction, none of the significant prejudices which beset our society today begins or ends when a state line is traversed. On the one hand, there are prejudices on racial, religious, economic, and other grounds which affect the administration of justice in actions between co-citizens as much as in those involving an out-of-stater. On the other hand, the bias which was formerly thought to operate against out-of-staters as such seems still to exist to some degree with respect to persons

81. The published 1965 draft was identical to the final report released in 1969 with respect to the proposed limitations on diversity jurisdiction referenced here.

from a more distant part of the country. The diversity jurisdiction thus may give protection from real or imagined prejudice against persons who are indeed out-of-staters although the reason for the prejudice does not lie simply in this fact. . . .

The justifications for general diversity jurisdiction support protection for a litigant from outside the state in which the district court sits; they do not support invocation of that jurisdiction by an in-stater. For this reason it is recommended that the right of a plaintiff to institute a diversity action in the federal court of his home state be abrogated.

Similarly, there are others, technically out-of-state citizens, who are no more deserving of the protection of a federal forum than the in-stater. The clearest instance is the corporation, chartered elsewhere, which has its principle place of business in the state; it is quite properly treated as a citizen of the state of its principle location for purposes of access to federal jurisdiction. The same is essentially true of other foreign business organizations which maintain substantial establishments within a state. They have become participants in the general life of the state, and have as much reason and opportunity to try to influence the development of its legal system as domestic business organizations. Whether in fact they do so or not, they are properly held to have accepted the hazards of that state's system as it exists. . . . For these reasons, limitations are recommended on access to a federal court by a foreign business enterprise in a state where it has for two years maintained a local establishment, in actions arising out of the activities of that establishment.

Along the same lines, the commuter in a metropolitan area like New York or Philadelphia is in no realistic sense an out-of-stater merely because he crosses a state line in order to reach the place where he earns his living. Insofar as the purpose of diversity jurisdiction is to protect from possible prejudice against strangers, the regular worker in the city is hardly a stranger among those who reside there. It is therefore believed that he should have no more access to the federal court in that state than the in-stater, and the proposed statute would thus provide.

[Document Source: American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts*, Official Draft Part 1, September 25, 1965, 47, 50–52, 54–55.]

Donald T. Weckstein, Opposition to Curtailment of Diversity Jurisdiction, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, October 5, 1971

The ALI released its final report in 1969<sup>82</sup> and submitted to Congress draft bills not only to reduce diversity jurisdiction, but also for the expansion of federal question jurisdiction, including the abolition of the minimum amount in controversy for general federal questions and a provision allowing the removal of a case from state court based on a federal law defense. Despite the continued growth of caseloads, some practitioners and law professors continued to oppose curtailing diversity jurisdiction. Professor Donald T. Weckstein of the University of Connecticut, who published widely on issues of jurisdiction, argued before a Senate subcommittee for the full retention of diversity jurisdiction. The federal courts, he argued, were part of a government to which citizens of all states could claim allegiance and provided the highest quality of justice. Weckstein believed that access to such courts should not be reduced for any reason.

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These provisions [of S. 1876 relating to diversity jurisdiction] are said to reflect the basic approach of the American Law Institute Study “that so far as possible state cases should be tried in state courts.” . . . The vice is in the application of this assumption; that diversity cases are state cases not federal in nature. . . . [U]nder the principles of federalism adopted by our Constitution, diversity cases are as much the business of the federal courts as federal question cases. Diversity cases do possess a federal element: the controversy is between citizens from more than one state and there is no tribunal outside of the federal court system to which all parties to the controversy can claim allegiance. And this federal element is present whether it is the out-of-state party or the local resident who invokes the federal court’s jurisdiction. . . .

The principle accepted by the A.L.I. Study is not merely concerned with avoiding possible local prejudice in state courts, but

82. American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* (1969).

in assuring a high level of justice to the out-of-state citizen. This is not to say that a high level of justice is unobtainable in state courts, but only that an out-of-stater should enjoy the security of knowing that he may resort to the federal courts where he would almost consistently find the high quality of justice for which they have become known. . . . Unfortunately, the A.L.I. Study did not carry this principle far enough. Although a citizen may be dissatisfied with the quality of justice in his own state, he is estopped from invoking diversity in the federal courts of such a state on the apparent theory that he shares “in its political life” and “is properly held to responsibility for its institutions. . . .” . . . The realism of this assumption is stretched even further when applied to corporations and other businesses which have maintained a local establishment for more than two years, and is completely discarded when the estoppel is similarly applied to a commuter of more than two years standing.

The fact is that citizens of all states look with favor upon the quality of justice in the federal courts, and their lawyers . . . frequently resort to the federal courts in diversity cases to obtain the benefits of modern discovery and pre-trial practices, liberal pleading and third-party practice, juries without unduly close local attachments rendering verdicts with the same safeguards and force as at common law, and judges of high caliber, adequately compensated, independent of political or non-judicial influences, with power, as at common law, to control the trial. In other words, these lawyers seek for their clients the highest quality of justice available for their particular controversy. And isn't this what courts are for? Just as law is made for man and not man for the law, do you not create courts to serve suitors and not statistical summaries or simplistic slogans. Regardless of the courts of individual states, is it not a function of the national government, under our system of federalism, to continue to make available to the broad extent authorized by the Constitution, that high quality of justice which its citizens have sought in such great numbers for so many years? . . .

The federal courts, and the Constitutional and Congressional draftsman who framed their jurisdiction and procedures, have be-

come the victims of their own success. Litigants, guided by their lawyers, seek federal court justice in increasing numbers—both in diversity and federal question cases. Faced with evermounting docket congestion, the notion that diversity cases, since they involve questions of state law, should be substantially curtailed has a definite surface appeal. But there are other values to be served; and these have been considered decisive by both those who wrote and adopted the Constitution and the implementing jurisdictional statutes. And, I might add, with the apparent support of the practicing bar and presumably those they represent, the people. These values, although changing somewhat in form and emphasis today, remain of significance and are reinforced by newly developed reasons to continue, and in some cases expand, the diversity jurisdiction of the federal courts.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 1876, The Federal Court Jurisdiction Act of 1971*, 92nd Cong., 1st sess., Part 1, 1971, 199–200, 202.]

#### U.S. Department of Justice, Committee on Revision of the Federal Judicial System, Recommendation for Abolition of Diversity Jurisdiction, Report of January 1977

By the late 1970s, many considered the federal courts to be in “crisis” because of the overwhelming number of cases being filed. In the view of the Department of Justice, diversity jurisdiction was the primary culprit, since diversity cases made up approximately 20 percent of total cases filed and a large majority of civil jury trials. Whereas the American Law Institute had recommended curtailing diversity jurisdiction, judges and Justice Department officials soon began to push for its abolition. In his address at the 1976 meeting popularly known as the Pound Conference, Solicitor General Robert H. Bork remarked that “if [diversity jurisdiction] can be abolished without serious costs to the administration of justice, the benefits to the federal system would be substantial.”<sup>83</sup> In 1977, the Department of Justice, under the direction of Attorney General and former

83. Robert H. Bork, “Dealing with the Overload in Article III Courts,” *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 236–237 (1976).

federal judge Griffin Bell, appointed the Committee on Revision of the Federal Judicial System. Concluding that the crisis facing the courts endangered their ability to protect individual federal rights, the committee urged that diversity jurisdiction be abolished.

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Our federal courts have served us so well for so long that we have come to take their excellence for granted. We can no longer afford to do so. The federal court system and the administration of justice in this nation need our attention and our assistance. Law and respect for law are essential to a free and democratic society. Yet without a strong and independent federal judicial system we can maintain neither the rule of law nor respect for it.

The central functions of the federal courts established under Article III of the Constitution of the United States are to protect the individual liberties and freedoms of every citizen of the nation, to give definitive interpretations to federal laws, and to ensure the continuing vitality of democratic processes of government. These are functions indispensable to the welfare of this nation and no institution of government other than the federal courts can perform them as well.

The federal courts, however, now face a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should. This is not a crisis for the courts alone. It is a crisis for litigants who seek justice, for claims of human rights, for the rule of law, and it is therefore a crisis for the nation. . . .

[M]easures must also be taken to curtail the flow of cases into the court system, or into particular courts, where the pressures of excessive volume are most acute. The jurisdiction of the federal courts has been revised several times in the past, always with beneficial results. It is now necessary again. . . .

The burden diversity jurisdiction imposes on the federal courts can no longer be justified. State courts, not federal courts, should administer and interpret state law in all such cases. Federal judges have no special expertise in such matters, and the effort diverts them from tasks only federal courts can handle or tasks they can handle significantly better than the state courts. Federal courts are

particularly disadvantaged when decision is required on a point of state law not yet settled by the state courts. The possibilities both of error and of friction between state and federal tribunals are obvious.

The modern benefits of diversity jurisdiction are hard to discern. The historic argument for diversity jurisdiction—the potential bias of state courts or legislatures—derives from a time when transportation and communication did not effectively bind the nation together and the forces of regional feeling were far stronger. . . . Diversity cases involving less than \$10,000 have been left to the States for many years without noticeable difficulty. The additional burden on the state courts would be small since the cases would be distributed among the fifty state systems. What is needed therefore is full elimination of diversity jurisdiction.

[Document Source: U.S. Department of Justice, Committee on Revision of the Federal Judicial System, *The Needs of the Federal Courts*, 1977, 1, 11, 14–15.]

Judge Henry J. Friendly, Prioritization of Federal Question Jurisdiction Over Diversity Jurisdiction, Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, September 29, 1977

Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit, regarded as one of the most accomplished judges on the federal bench, argued during the 1970s that prior to adopting a major reorganization of the appellate system, such as the splitting of circuits or the creation of a national court of appeals, Congress should consider dramatically reducing federal jurisdiction. “If a stream is in mounting flood,” he said in 1973, “common sense would dictate consideration of measures to divert a portion of the flow.”<sup>84</sup> In testimony before Congress in 1977, Friendly echoed Supreme Court Justice Felix Frankfurter’s sentiments that the federal judiciary should remain small in order to maintain its high standard of quality. He also argued that the federal courts should prioritize the protection of federal rights and the hearing of cases dealing with

84. Henry J. Friendly, “Averting the Flood by Lessening the Flow,” *Cornell Law Review* 59, no. 4 (April 1974): 634–635.

traditional areas of federal authority, including the enforcement of federal criminal law. Based on these priorities, Friendly believed the abolition of diversity jurisdiction was inevitable.

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Being a Federal judge today . . . is an altogether different and infinitely more demanding task than when I went on the bench 18 years ago. The Federal courts have become, as they should be, the primary protectors of the basic civil rights of all citizens. They also have been assigned vital tasks designated by Congress relating to welfare programs, protection against various sorts of fraud and overreaching, the promotion of safety and the protection of the environment. Proper performance of these tasks, as well as traditional Federal business as admiralty, antitrust, bankruptcy, copyright, patents and trademarks, review of Federal administrative action, and the enforcement of the expanding Federal criminal law, now made even more demanding by the Speedy Trial Act, requires all that a Federal judge can give. He should not be distracted from these important tasks by cases all turning on State law which a State judge can generally handle as well and in many instances can handle better. . . .

This predictable heavy increase in Federal question litigation cannot be handled by a corresponding increase in the number of Federal district judges. First, that is a solution which almost nobody wants. The strength of the Federal judiciary has come in no small part from its relatively small size. . . . [C]ertainly a point does come when further substantial increases in the number of district judges would destroy the very values of the Federal courts that we wish to preserve. Congress should not be asked to provide more judges simply to handle diversity cases. . . .

Diversity cases stand altogether apart from all others in the Federal courts. They involve no claim of Federal right. They are based solely on State law. Their subject matter is exactly like that of cases which, in much larger numbers, are being tried daily in the courts of the States by judges who are thoroughly experienced in handling them. . . .

I recognize that in addition to the fear of prejudice properly so called there is a more generalized distrust of some State judges. I



do not know whether this is justified or not, but, if there is a problem, it is not the business of the Federal Government to attempt to cure it by providing an exit for a few litigants having no proper claim to special consideration. There is simply no justification for adding more Federal judges, increasing the burdens on the Federal judges, or creating more circuits just because lawyers may feel more comfortable in trying a State claim in a Federal court than in the State courts . . . .

In conclusion let me emphasize that the desire of most Federal judges to be rid of diversity jurisdiction does not stem from a desire to do less work or to deny access to worthy suitors. The last thing that Federal judges want to do is to deny access to the Federal courts to people who need it. The desire rather is to be able to do a better job for the suitors who most need that access, people making claims of constitutional rights or asserting rights under statutes which have been passed by Congress. I think diversity jurisdiction is going to have to be abolished sometime and I ask the question, why not now?

[Document Source: U.S. House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, *Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform*, 95th Cong., 1st sess., 1977, 202–204, 207–208.]

### Legal Services Attorneys, Elimination of Barriers to Enforcement of Federal Rights, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, March 20, 1978

While legal academics like Herbert Wechsler believed in the curtailment of diversity jurisdiction as a matter of principle, attorneys who represented parties who benefited from federal court enforcement of federal rights had a more concrete concern. To these lawyers, cases in federal court by virtue of diversity of citizenship represented competition for scarce judicial resources. A panel of legal aid attorneys from Arizona, Delaware, and New York appeared before a Senate subcommittee to present a statement on behalf of lawyers across the country. The attorneys pointed out that delays attributable to court congestion were especially problematic for the poor, whose attempts to secure their federal rights—regarding housing, health care, public assistance, and other important resources—were often urgent. (The NAACP Legal Defense Fund made a similar ar-

gument regarding federal enforcement of the civil rights of African Americans.) Eliminating diversity jurisdiction, the attorneys asserted, would lead to speedier resolutions of cases involving federal questions. Also of importance to poor litigants was a proposal to eliminate the minimum amount in controversy for federal question cases, a reform Congress ultimately enacted in 1979.

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The group has been communicating for the past several months about ways to eliminate the barriers which are increasingly preventing their low-income clients from gaining access to the federal courts to vindicate their federal rights. . . .

S. 2389 . . . is the most important bill before this Congress concerning access to federal court. It deals with two major barriers: 1) by removing the \$10,000 amount in controversy requirement for federal question cases, it guarantees a federal forum for the litigation of federal rights and 2) by eliminating diversity of citizenship jurisdiction, it reduces federal court docket congestion. . . .

Diversity of citizenship jurisdiction no longer serves any important purpose and cases based solely on diversity do not belong in federal courts, given the current strain on their limited resources. . . . Today...there is little evidence of state judicial prejudice against litigants from other states. . . . Basic principles of federalism once supported the concept of diversity jurisdiction. Today, absent widespread bias, that same federalism demands that state courts interpret their own law of contracts, torts, and real property, not courts of the federal government.

Even assuming there is *some* lingering validity to the arguments for diversity jurisdiction, the case for the abolition approach in S. 2389 still remains strong given the currently crowded federal dockets. Congress should concentrate limited federal court resources upon issues where these courts have a special expertise and role. Questions of federal statutory and constitutional law must take priority over those of state contract, tort, and real property law.

The abolition of diversity jurisdiction would have a great impact in unclogging our federal courts. . . .

Measured against a relatively infrequent use of diversity of citizenship as a basis of jurisdiction must be the disproportionate im-

pact federal court congestion visits on the poor. Their cases usually involve basic survival issues—the right to a job, housing, public assistance to feed and shelter their families, health care. The poor by definition lack the resources to sustain themselves without the essentials of life pending the resolution of bogged down litigation. Overcrowded dockets for them means not only delay but destitution. We therefore have no hesitation in supporting that portion of S. 2389 which abolishes diversity jurisdiction.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2094, S. 2389 and H.R. 9622, Diversity of Citizenship Jurisdiction*, 95th Cong., 2nd sess., 1978, 148, 151–152.]

Robert G. Begam, Importance of Forum Choice, Testimony Before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, September 21, 1977

Many trial attorneys and corporate counsel defended diversity jurisdiction from attacks throughout the late 1970s and 1980s. Each time Congress held a hearing on the subject, it was flooded with petitions from state and local bar associations objecting to curtailing the jurisdiction. The American Bar Association was also opposed to any change; its full house of delegates overruled a special committee that had recommended supporting abolition.

Robert G. Begam, past president of the American Association of Trial Lawyers, made up mainly of plaintiffs' attorneys, testified before a House subcommittee in 1977 that litigants had come to rely on having a choice of forums and that preferences for state or federal courts were subject to fluctuation. Begam argued that the congestion of state and federal court systems was cyclical—as practitioners sought to avoid delays they would naturally shift caseloads between the two—and that curtailment of diversity jurisdiction would overburden the state courts.

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The basic function of government is to serve the people with respect to those societal functions that cannot be provided as effectively by the private sector. Basic among the various governmental services is the court system. And one of the most basic services provided by the Federal Government is the Federal judi-

cial system. To the extent that it has co-existed with state judicial systems it has always been an alternative rather than primary or sole system of Justice. It is in the very offering of an alternative—an option as to dispute resolution—that we believe the Federal Government is providing its citizens with a social service of unquestionable legitimacy. . . .

In most areas around the country, the writer has not been able to find a single trial lawyer who did not believe that a right to the choice of jurisdiction, where diversity of citizenship exists, was not an important right of his client, and one which should be preserved. . . .

Delay is a concern which is stressed by proponents of this legislation. What is the attitude of the practicing bar toward delay? In some jurisdictions, such as my State of Arizona, there is now, in 1977, more delay on the Federal than on the State side. This is a relatively recent development. In 1971, when extensive hearings were conducted in the Senate on this subject, the opposite was true. In other States, such as Illinois, there was then and still is considerably more delay in State courts than Federal. Given a choice of forums, there is a natural tendency for a plaintiff to stand in a shorter line, absent some countervailing consideration of profound impact. An Arizona plaintiff seeking redress for a wrong is not likely to wait 3 or 4 years for a Federal trial when he can get to court in 12–16 months in State court, unless he would be seriously prejudiced in the available state courthouse by other factors.

So, with the present “choice of forum” system, differences in delay time between State and Federal courts tend to be self-adjusting. History demonstrates that these differences are cyclical. Ten years ago in Arizona, by way of example, plaintiffs chose Federal court whenever possible because there was less congestion.

This movement to the Federal courts, along with an exploding criminal load and the failure to provide an adequate number of judges, has converted Federal courts in Phoenix from current to congested. In 1977, plaintiffs invariably choose State courts because they are faster.

One can foresee that the pendulum will soon start swinging the other way, as these natural forces generate another cycle. Severe curtailment of diversity jurisdiction will push everything into

State court and give the plaintiff no option when State courts are again badly congested and Federal courts are again relatively current. . . .

Most trial lawyers would agree that those who propose change should bear the burden of proof. We have heard no substantial reason advanced for limiting diversity except the chance of lessening delay in Federal courts, and a desire to lighten the case load. My friend and teacher, John P. Frank, has summarized my viewpoint with respect to this argument when he said: "Manure is not made more attractive by moving it from one pile to another."

This is a colorful but terribly accurate observation. We submit that it also puts into perspective the blind advocacy of "Judicial efficiency" which has become so vogueish in this, and other, contemporary legal debates. Court congestion is certainly not a virtue; but it may well be symptomatic of a virtue—the virtue of a calm, deliberative and thorough legal system which values the protection of human rights above all else. We should always remember that there is no court congestion in Uganda.

[Document Source: U.S. House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, *Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform*, 95th Cong., 1st sess., 1977, 71–72.]

Edward W. Mullinix and John C. Shepherd, Support for Retention of Diversity Jurisdiction, *American Bar Association Journal*, June 1979

The nation's trial attorneys were not prepared to concede that diversity jurisdiction represented an unwarranted burden on the federal courts. They opposed the idea that the state and federal judiciaries ought to exist in totally separate spheres. Edward Mullinix, Philadelphia attorney and chair of the ABA Section on Litigation, and John C. Shepherd, chair of the ABA House of Delegates, wrote in the ABA Journal that diversity jurisdiction allowed the two sets of courts to act as "working partners" in the enforcement of state law. The exposure of federal courts to state law—and of state courts to federal law—had led, they asserted, to a sharing of ideas about court procedure and administration that benefited both systems and all litigants. Mullinix and Shepherd also dismissed the argument that diversity jurisdiction was no longer needed because out-of-state

parties were no longer subjected to local prejudice in state courts, claiming that local prejudice was still an issue of concern throughout the legal profession.

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THE diversity of citizenship jurisdiction of the federal courts has served the ends of justice well for nearly 200 years. We recently appeared before a subcommittee of the House Judiciary Committee to present the American Bar Association's position that Congress should not alter that jurisdiction, as is currently being proposed, in the absence of a compelling showing of the need for change.

The proponents of change have not made that showing. They argue that the federal courts are overburdened and that abolishing diversity jurisdiction would reduce their caseloads. We do not believe that the cure for an overburdened justice system is to limit the public's access to the system. The most obvious solution is to increase the capacity of the system, as the 95th Congress did, with the American Bar Association's support, in authorizing additional courts of appeals and district court judgeships. Another possibility is to improve efficiency. An effort in this direction is the experimentation with compulsory arbitration for certain kinds of cases in the federal district courts. Another is the magistrates legislation, which the A.B.A. supported and would have been enacted if the House of Representatives had not tried to tie it to abolition of diversity jurisdiction. . . .

We do not accept the contention that diversity jurisdiction has outlived its usefulness because there is no longer any significant prejudice in state courts against out-of-state litigants. There is local prejudice. Nearly every lawyer who has a good deal of trial experience has encountered it, not just in state courts but in federal courts as well. There is no way to stamp out prejudice, but the availability of the federal forum for some cases gives litigants a choice. . . .

We do not agree with the contention that state courts, rather than federal, should be deciding questions of state law. The plausibility of that contention is only superficial. There are many benefits inherent in our present system of federal courts as working

partners with the state courts in the enforcement of rights arising under state law, just as the state courts are working partners with the federal courts in the enforcement of rights under federal law.

The co-ordinate jurisdictions of the state and federal courts have permitted the migration of ideas between the two systems. Each has learned from the other. This interaction has contributed materially to constant improvement in civil and criminal procedural rules, rules of evidence, and court administration techniques. . . .

The present system of co-ordinate federal and state jurisdictions has been an important part of our federalism that we should not lightly abandon. No one has asserted, much less demonstrated, that diversity jurisdiction, which had its genesis in the Constitution and has been with us since the first Judiciary Act in 1789, has resulted in any injustice to any litigant. Abolishing that jurisdiction would have a serious, adverse effect on the administration of justice in the United States.

[Document Source: Edward W. Mullinix and John C. Shepherd, "For Retention of Diversity Jurisdiction," *American Bar Association Journal* 65, no. 6 (June 1979): 860.]

### Federal Courts Study Committee, Recommendation for Elimination of Diversity Jurisdiction, Report of April 2, 1990

Congress failed to pass legislation curtailing or abolishing diversity jurisdiction in the late 1970s, but the issue continued to be debated in the pages of law reviews over the next decade. In 1988, abolition of diversity jurisdiction was a key part of the proposed Judicial Improvements and Access to Justice Act. The House Judiciary Committee received a flood of letters from state bar associations and corporate lawyers throughout the country protesting the measure. Congress eventually excised abolition from the bill and replaced it with an increase in the minimum amount in controversy from \$10,000, established in 1958, to \$50,000.

The 1988 statute's most important provision was the creation of the Federal Courts Study Committee, a body whose members were appointed by the Chief Justice of the United States and consisted of lawyers, judges, and members of Congress. In its 1990 report, the committee proposed elimination of most diversity jurisdiction. Like Herbert Wechsler and Chief Justice Earl Warren decades before, the Federal Courts Study Committee called for a "principled allocation of jurisdiction." As further evidence of the enduring rift on the sub-

ject, two members of the committee contributed a dissent emphasizing that diversity jurisdiction was an integral part of the mission of the federal courts. The committee's report did not result in any immediate legislative action on the subject.<sup>85</sup>

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### *Reallocating Business Between the State and Federal Systems*

This chapter mainly presents recommendations to improve the allocation of business between state courts and the federal courts established under Article III of the Constitution. One purpose of these recommendations is to improve the federal courts' capacity to resolve disputes that most need federal court attention by relieving them of some functions that involve federal rights or interests only marginally if at all.

Not all of our proposals would shift business from federal to state courts, however, and none of our proposals carries any inference that the state courts are inferior to the federal courts and should thus be a repository for cases federal judges prefer not to decide. Rather, our goal is a *principled* allocation of jurisdiction. For that reason, some of our proposal would expand federal jurisdiction to cases that involve both federal and state law and for which the federal forum is more appropriate. . . .

In most diversity cases, however, there is no substantial need for a federal forum. Federal courts offer no advantage over state courts in interpreting state law; quite the reverse. Federal rulings on state law issues have little precedential effect. Proponents of diversity jurisdiction say that these litigants need access to federal courts because of local bias in state courts. We concede that this may be a problem in some jurisdictions, but we do not regard it as a compelling justification for retaining diversity jurisdiction. . . .

The current law already recognizes that diversity cases dissipate federal judicial resources—at least if the claim is for more than \$50,000. Diversity is one of the few areas in which Congress

85. *The Long Range Plan for the Federal Courts*, a strategic study adopted by the Judicial Conference of the United States in 1995, also made several recommendations to limit diversity jurisdiction. Those recommendations included an increase in the amount-in-controversy requirement which, as mentioned above, Congress enacted in 1996.



has retained a minimum jurisdictional amount-in-controversy requirement. This is a pragmatic but essentially arbitrary attempt to limit the diversion of federal courts from their primary role of litigating federal constitutional and statutory issues. Similarly, the well-established requirement for *complete* diversity—that all plaintiffs be citizens of different states from all defendants—has the effect of containing the excesses of diversity jurisdiction. But these attempts to confine diversity jurisdiction create their own problems, as parties seek to inflate their claims to come within the \$50,000 minimum, split related cases between state and federal courts, or maneuver to defeat federal diversity jurisdiction. . . .

Diversity is a source of friction between state and federal courts, particularly when a party commences an action based on diversity that is identical to an action pending in state court. Lack of consistency between federal interpretations of state law and subsequent pronouncements by a state's highest court can lead to contrary results in similar cases. Moreover, eliminating diversity jurisdiction will stimulate political pressure for state court reform.

*Dissenting statement of Mr. Harrell and Mrs. Motz:*

Congress created diversity jurisdiction 200 years ago to avoid possible discrimination against out-of-state parties by providing a forum free of political influences and entanglements. A number of recent, well-publicized cases unquestionably demonstrate and affirm that diversity jurisdiction is still necessary to guard against this very problem, whether the out-of-state party is a plaintiff or defendant. The availability of the alternative federal forum is often an important element of justice well worth its minor costs.

Moreover, experience shows that diversity jurisdiction, rather than being, as the report suggests, a “source of friction” between state and federal courts, is an important part of Our Federalism. Federal judges are kept abreast of state law and in touch with the real concerns of local citizens and businesses. Without diversity cases, the “cross-fertilization” and flow of ideas in each direction (e.g., the Federal Rules of Evidence, and of Civil and Criminal Procedure have drawn many changes over the years from state rules and many states have adopted changes originating in the federal rules) would undoubtedly diminish. . . .

In our view, the recommendation to abolish diversity jurisdiction, which relies on statistics which concededly may be unreliable . . . vastly overstates the cost incurred by the federal courts in retaining diversity jurisdiction. However, whatever those costs are, they are not nearly significant enough to justify the abolition of diversity jurisdiction.

[Document Source: *Report of the Federal Courts Study Committee*, April 2, 1990, 35, 40–43.]

## *The Anti-Trial Movement*

By the 1970s, many judges and lawyers began to argue that traditional litigation was imposing a crushing burden on the judicial system. They also questioned whether all disputes should be resolved through litigation. In 1977, for example, Judge Shirley Hufstедler of the Ninth Circuit advised “that Congress seriously consider some alternative approaches to access to justice that do not involve litigation.”<sup>86</sup> In an influential speech in 1982, Derek Bok, the president of Harvard University and the former dean of Harvard Law School, praised the courts for their role in vindicating the rights of African Americans, women, and consumers over the previous two decades, but argued that the adversarial system had morphed into an obstacle to justice for most Americans.<sup>87</sup> In his state of the judiciary address in 1982, Chief Justice Warren Burger expressed his desire to find “a better way” to deliver justice.<sup>88</sup>

The effort to steer cases away from litigation centered on two proposals. One idea was to give judges greater control over the pretrial processes of a case with the goal of facilitating speedier disposition through settlement. More than 90 percent of civil cases filed in federal court were settled prior to trial, but the process of preparing a case for

86. Testimony of Shirley M. Hufstедler, U.S. House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, *Hearings on State of the Judiciary and Access to Justice*, 95th Cong., 1st sess., July 21, 1977, 149–150.

87. Derek Bok, “Law and Its Discontents: A Critical Look at Our Legal System,” *Record of the Association of the Bar of the City of New York* 38, no. 1 (January–February 1983): 12–33.

88. Warren E. Burger, “Isn’t There a Better Way?” *American Bar Association Journal* 68, no. 3 (March 1982): 274–277.

trial, including the discovery phase, was often lengthy and expensive. Procedural rule changes in the early 1980s enhanced the role of judges as case managers and encouraged them to facilitate settlements early in the pretrial process. In some district courts, magistrates were charged with holding mandatory settlement conferences almost immediately after a case was docketed. The second major policy proposal was to explore new channels, other than traditional litigation, for disposing of cases within the courts. These proposals included methods such as arbitration and mediation, which were often grouped under the term *alternative dispute resolution*, or ADR.

Judicial case management, settlement, and court-annexed<sup>89</sup> ADR raised important questions about the role of the judge in civil litigation and whether access to justice in the federal courts necessarily meant access to an Article III judge and a trial by jury. The debate pitted judges, law professors, and practitioners who believed that the proposals at issue prioritized efficiency over justice, unduly curtailed access to the courts, and weakened the enforcement of federal rights, against those who believed that the stronger hand of judges and a “multi-door courthouse” with many options for resolving disputes better served the interests of justice in the modern era.

## *Case Management and Settlement*

Beginning in the late 1970s, judges and legal academics began to argue that the problems ailing the federal courts could be solved through greater judicial management of cases with the goal of guiding cases to early settlement. Supporters of this approach hoped that rather than letting lawyers control the pace of discovery and progress of the case to trial, judges would schedule deadlines for discovery and work with lawyers to delineate the legal and factual issues to be tried.

Amendments to the Federal Rules of Civil Procedure adopted in the early 1980s brought a new emphasis on judicial case management and settlement to the fore and sparked considerable debate about the evolving role of judges in civil litigation. The 1983 rule amendments gave judges authority to sanction lawyers for filing frivolous lawsuits,

89. Court-annexed arbitration and mediation involves the court’s diversion to alternative dispute resolution of cases already filed in court. Private arbitration and mediation, on the other hand, are undertaken by agreement of the parties with no involvement from the judicial system.

expanded the role of judges in encouraging settlement early in the pretrial process, and allowed judges to place limits on discovery and sanction lawyers for abuse of the discovery process. (A proposed rule change that was not adopted would have penalized plaintiffs for rejecting settlement offers by requiring them to pay the defendant's attorneys' fees if the jury award was lower than the settlement offer.) Judge Robert Peckham of the U.S. District Court for the Northern District of California asserted that the rule changes had "radically transformed the federal judge from a passive umpire to a managerial activist."<sup>90</sup>

By 1986, the percentage of civil cases resolved by trial had declined to 6 percent. The focus on facilitating settlement led to concern among plaintiffs' attorneys, however, that their clients were being denied access to impartial tribunals in the name of expediency.

Judge William W Schwarzer, Advocacy for Judicial Pretrial Management, *Judicature*, April 1978

In the mid- to late-1970s, federal judges began to speak out about how they could help to expedite the disposition of civil litigation. Many believed the answer lay in judges taking a more active role in the pretrial stages of a case. Managerial judging, as the practice became known, challenged some long-held beliefs about the role of the judge in the adversarial system of justice.

U.S. District Judge William Schwarzer of the Northern District of California, a future director of the Federal Judicial Center, advocated active pretrial management in a 1978 *Judicature* magazine piece. Schwarzer contended that passive judging, in which judges left the progress of a case to the attorneys, was not conducive to achieving justice because it failed to ameliorate crowded dockets. A judge who actively guided a case toward settlement, he asserted, could ensure that cases did not drag on and become unduly expensive, a result that would also allow judges to devote more time to cases of greater complexity.

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Most civil cases are terminated before trial; in the federal system, less than 10 per cent of the cases filed go to trial. Most judi-

90. Robert F. Peckham, "A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution," *Rutgers Law Review* 37, no. 2 (Winter 1985): 254.

cial and private effort is expended on litigation that never reaches trial, through discovery, motions, and other formal and informal interlocutory proceedings. It is a frequent complaint that costs incurred even before trial make litigation uneconomical. . . .

Although adequate power exists for judicial intervention, the concept of judicial intervention runs counter to accepted notions. The first of these . . . is the traditional conception of the judge's role in the adversary process: that the judge is supposed to be passive and let lawyers litigate without interference except when one side or the other calls upon him. . . .

[J]ustice is not better served by the passive judge who by inaction permits litigation to blunder along its costly way toward exhaustion of the litigants, when it might have long been settled or at least controlled to everyone's benefit. One may fairly ask whether the parties left to themselves can always be depended on to prosecute litigation diligently, economically, and in good faith; to avoid wars of attrition and harassment, obstruction and delay; and to exclude extraneous personal considerations from the conduct of the litigation. . . .

[S]ome criticize preoccupation with efficiency, placing quantity above quality in dispensing justice. Implying judges are becoming subservient to computers and productivity statistics, they argue "slow justice is always preferable to speedy injustice."

That argument, however, does not undercut the case for judicial management of litigation when the purpose is to achieve the optimum allocation of resources, judicial and private. If by judicial intervention, discovery burdens are lightened, settlement achieved at an earlier point, or trial shortened, the interests of justice are served for the litigants directly involved and for others whose cases are pending. . . .

[T]he controversy is likely to assume more modest dimensions and more manageable shape after the judge, with his knowledge and experience, has discussed the case with the parties and directs them to talk to each other. And as cases are brought to a more rapid conclusion than under the traditional 'laissez-faire' system, the quality of justice improves because judges will have more time to devote to the cases remaining on their docket. It seems, therefore, that the busier the judge and the heavier his caseload, the more urgent the need for intervention early in civil cases, espe-

cially where calendars are burdened with criminal cases entitled to priority.

The plain truth is that trial will not reduce the caseload; the rate at which cases can be tried does not approach the rate at which they are filed, even allowing for terminations by normal attrition. Trials, moreover, are the most costly and inefficient way of resolving disputes and the least productive allocation of the judge's time. While trials must be available to resolve meritorious disputes that cannot otherwise be resolved, they should be regarded as the last resort. . . .

Settlement should be an item on the agenda for each conference. If intervention accomplishes nothing else, it should at least compel communication between opposing counsel and remove the psychological and tactical roadblocks that frequently stand in the way of meaningful negotiations. Inasmuch as over 90 per cent of the cases are eventually settled, it benefits everyone if the case settles sooner rather than later. The practice of settling on the courthouse steps results in unnecessary expense in preparing for trial and to cluttered dockets which burden the court and all litigants.

Not all cases can or should be settled. But in most cases, the court can help the parties see the risks and equities on both sides and the benefits of a settlement. This is not always a matter simply of economics. Increasingly, lawsuits bring into the courts controversies that require problem solving and mediation rather than conventional legal decisions. In cases involving civil rights, the environment and other social issues, disputes may at times be resolved more satisfactorily through mediation than trial. In some instances, the court has performed its function by lending a sympathetic ear to the complaining party's grievance, after which he may be ready to compromise. . . .

The passive judge who, conforming to the traditional role model, passes up the opportunity to serve as a catalyst for settlement, will probably try many cases that could have been settled and, in doing so, will render no particular benefit to the administration of justice.

[Document Source: William W Schwarzer, "Managing Civil Litigation: The Trial Judge's Role," *Judicature* 61, no. 9 (April 1978): 402–408.]

Judith Resnik, Criticism of Managerial Judging, *Harvard Law Review*, December 1982

Among changes to the Federal Rules of Civil Procedure proposed in 1981 and adopted in 1983 was language added to Rule 16, which governed pretrial conferences and case management. The Advisory Committee on Civil Rules of the Judicial Conference of the United States desired “to insure closer and more effective judicial scheduling, management and control of litigation as a means of avoiding unnecessary delay and expense.”<sup>91</sup> The amended rule stated that pretrial conferences were for “expediting disposition of the action” and “facilitating the settlement of the case.” Though pretrial conferences were “encouraged, not mandated,” according to the advisory committee, this new language combined with other rule amendments suggested a major change in the role of the federal judge in dispute resolution.

In an oft-cited essay in the *Harvard Law Review*, Professor Judith Resnik criticized the emergence of managerial judging, warning that it increased the power of judges in ways that threatened their impartiality. Most troubling to Resnik was that this power would be used to push parties toward settlement, a practice that she believed prioritized efficiency over justice in disposing of cases.

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I believe that the role of judges before adjudication is undergoing a change as substantial as has been recognized in the post-trial phase of public law cases. Today, federal district judges are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion. Judges have described their new tasks as “case management” hence my term “managerial judges.” As managers, judges learn more about cases much earlier than they did in the past. They negotiate with parties about the course, timing, and scope of both pretrial and posttrial litigation. These managerial responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work be-

91. Memorandum from Walter R. Mansfield to Judge Edward T. Gignoux, March 9, 1982 (quoted in Rebecca Love Kourlis and Brittany K.T. Kauffman, “Rule Reform, Case Management, and Culture Change: Making the Case for Real and Lasting Reform,” *Kansas Journal of Law and Public Policy* 24, no. 3 (Summer 2015): 504).

yond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review. . . .

Partly because of their new oversight role and partly because of increasing case loads, many judges have become concerned with the volume of their work. To reduce the pressure, judges have turned to efficiency experts who promise “calendar control.” Under the experts’ guidance, judges have begun to experiment with schemes for speeding the resolution of cases and for persuading litigants to settle rather than try cases whenever possible. During the past decade, enthusiasm for the “managerial movement” has become widespread; what began as an experiment is likely soon to become obligatory. Unless the Supreme Court and Congress reject proposed amendments to the Federal Rules, pretrial judicial management will be required in virtually all cases.

In the rush to conquer the mountain of work, no one—neither judges, court administrators, nor legal commentators—has assessed whether relying on trial judges for informal dispute resolution and for case management, either before or after trial, is good, bad, or neutral. Little empirical evidence supports the claim that judicial management “works” either to settle cases or to provide cheaper, quicker, or fairer dispositions. Proponents of judicial management have also failed to consider the systemic effects of the shift in judicial role. Management is a new form of “judicial activism,” a behavior that usually attracts substantial criticism. Moreover, judicial management may be teaching judges to value their statistics, such as the number of case dispositions, more than they value the quality of their dispositions. Finally, because managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority. In short, managerial judging may be redefining *sub silentio* our standards of what constitutes rational, fair, and impartial adjudication. . . .

According to proponents of judicial management, judges are the only advocates for the claimants waiting at the end of the queue and for the public, which benefits from and pays for the dispute resolution system. Therefore, judges should take charge of the system and allocate their time in a prudent, coherent, and



fair manner. They should speed cases at the head of the line and discipline litigants who waste resources. The result would be an efficient court system, which (like the end of every other utilitarian tale) would in turn produce the greatest good for the greatest number of people. . . .

In the rush to conquer case loads, few proponents of managerial judging have examined its side effects. Judicial management has its own techniques, goals, and values, which appear to elevate speed over deliberation, impartiality, and fairness. . . .

Proponents of management may be forgetting the quintessential judicial obligations of conducting a reasoned inquiry, articulating the reasons for decision, and subjecting those reasons to appellate review—characteristics that have long defined judging and distinguished it from other tasks. Although the sword remains in place, the blindfold and scales have all but disappeared.

[Document Source: Judith Resnik, "Managerial Judges," *Harvard Law Review* 96, no. 2 (December 1982): 378–380, 415, 424–425, 431.]

Judge Robert F. Peckham, Criticism of Laissez-Faire Judging,  
*Rutgers Law Review*, Winter 1985

Judith Resnik's critique of managerial judging elicited numerous responses from within and without the judiciary. Judge Robert Peckham of the U.S. District Court for the Northern District of California rejected what he saw as Resnik's desire to adhere to a laissez-faire concept of judging. Spiraling costs were creating barriers to access for poor and middle-class litigants, he asserted, and the interests of justice required that the adversarial system be modified. Peckham believed that judges had a responsibility to ensure that disputes were resolved efficiently, and that meant taking an active role in getting lawyers and parties to cooperate and, when possible, come to agreements prior to trial.

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Professor Resnik raises a serious issue when she questions whether judicial supervision will ultimately weaken the adversarial system. She fears that a judge may take the direction of the lawsuit away from the parties or coerce a settlement, thereby precluding adjudication on the merits. While acknowledging many of the problems which have led to case monitoring, she differs

from this author in her assessment of the proper response to these developments. Professor Resnik places the onus of responsibility for the orderly and prompt disposition of litigation with the bar, whereas I place that responsibility equally, if not primarily, on the shoulders of the judge. She wishes to preserve the *laissez-faire* character of the adversarial system. I contend, however, that our adversarial system has run amok and that the movement toward judicial oversight represents an effort to preserve the best qualities of the system. Case supervision is not a fundamental departure from the adversarial model but rather a modification that facilitates its meaningful operation. It does not detract from the lawyers' traditional function, but instead assists attorneys in planning the efficient progress of lawsuits.

Furthermore, there is nothing sacrosanct about the adversarial system. It is a mere instrument by which to achieve the just resolution of disputes. If it can no longer fulfill that function effectively, it must be modified. From many quarters one hears the cry that the adversarial system is seriously flawed and cannot be retained in its present form. Under the *laissez-faire* model, the costs and delays of litigation have multiplied apace. These characteristics of our present system have forced many parties to enter inadequate settlements or to forgo attempts to protect their legal rights.

Justice is becoming ever more inaccessible to the poor and middle class; the disparity of resources between parties in a case is often determinative of its outcome. As Judge Frankel has so forcefully stated: "The colossal problem of paying for lawyers and lawsuits . . . is, in the last analysis, at the heart of the evil of unequal justice. . . ."

This state of affairs cannot be allowed to continue. The problems, however, are systemic rather than discrete. . . .

Judges must support the movement toward alternative forums of decision making and voluntary mechanisms for dispute resolution. They must also assist and educate attorneys appearing in their courts to avoid unnecessarily combative or intransigent tactics. Judges cannot remain safely on their remote pedestals but must work with attorneys to place reason and civility before contentiousness and resistance. There is a direct correlation between the need for a judge to exert firm and forceful supervision and the conduct of counsel. Judicial intervention will encourage and

enable attorneys to reconcile their adversarial ideals with the demands of justice. Such cooperation will not flourish without guidance.

Earlier in this century, we recognized that the laissez-faire of capitalism, in its pure form, was no longer appropriate for our complex modern society, that individual liberty would not be adequately protected by a government which served only as a passive night watchman, and that limited regulation would in fact enhance true freedom and preserve the best aspects of our system. Similarly, the cause of justice can no longer be served by a laissez-faire judicial model. Our controlled inaction is an affirmative choice, an abdication of our responsibility to use our power to assist in restoring the health of the system. We are not lowered by our participating in the movement but rather by our failing to do so. Professor Resnik wishes to bring back the judicial blindfold, but we cannot remain blind to the fact that the court's traditional remoteness contributes to the devastating abuses which threaten to subvert our system of due process.

[Document Source: Robert F. Peckham, "A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution," *Rutgers Law Review* 37, no. 2 (Winter 1985): 264-266.]

### Owen M. Fiss, Centrality to Court's Purpose of Making Judgments, *Yale Law Journal*, May 1984

In an influential 1984 *Yale Law Journal* article, legal scholar Owen Fiss of Yale Law School took issue with the increasing emphasis on settlement over trial. Although he was writing in the context of the movement toward alternative dispute resolution, Fiss's broader point was that the purpose of the courts was not merely to resolve disputes, but rather to make judgments, and that those judgments were central to the "social function" of the courts. For Fiss, pressure to settle deprived the courts of the ability to deliver justice in a way that benefited society at large, rather than simply on terms that quieted conflict between two parties.

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The advocates of ADR are led to support such measures and to exalt the idea of settlement more generally because they view adjudication as a process to resolve disputes. They act as though

courts arose to resolve quarrels between neighbors who had reached an impasse and turned to a stranger for help. Courts are seen as an institutionalization of the stranger and adjudication is viewed as the process by which the stranger exercises power. The very fact that the neighbors have turned to someone else to resolve their dispute signifies a breakdown in their social relations; the advocates of ADR acknowledge this, but nonetheless hope that the neighbors will be able to reach agreement before the stranger renders judgment. Settlement is that agreement. It is a truce more than a true reconciliation, but it seems preferable to judgment because it rests on the consent of both parties and avoids the cost of a lengthy trial.

In my view, however, this account of adjudication and the case for settlement rest on questionable premises. I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised. . . .

The dispute-resolution story makes settlement appear as a perfect substitute for judgment . . . by trivializing the remedial dimensions of a lawsuit, and also by reducing the social function of the lawsuit to one of resolving private disputes: In that story, settlement appears to achieve exactly the same purpose as judgment—peace between the parties—but at considerably less expense to society. The two quarreling neighbors turn to a court in order to resolve their dispute, and society makes courts available because it wants to aid in the achievement of their private ends or to secure the peace.

In my view, however, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branch-

es, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle. . . .

To be against settlement is not to urge that parties be “forced” to litigate, since that would interfere with their autonomy and distort the adjudicative process; the parties will be inclined to make the court believe that their bargain is justice. To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality. Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal.

[Document Source: Owen M. Fiss, “Against Settlement,” *Yale Law Journal* 93, no. 6 (May 1984): 1075, 1085–1086.]

Judge Jack B. Weinstein, *Dangers of Restricting Access to the Courts*, *University of Pennsylvania Law Review*, June 1989

After the Supreme Court promulgated new civil rules in 1983, the Advisory Committee on Civil Rules continued to propose changes to give judges more tools to manage litigation and bring cases to quick resolution. A particularly controversial proposal was to amend Rule 68, which governed settlement offers. The proposal would have forced plaintiffs who rejected a settlement offer to pay the defendant’s post-offer attorneys’ fees if the jury award was less than the settlement offer. The committee explained that the proposed rule was designed “to encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur, which should lead to more dispositions of cases before the heaviest expenses have been incurred.”<sup>92</sup> After vocal opposition from public interest lawyers and organizations, the proposed rule was withdrawn.

92. Committee on Rules of Practice and Procedure of the Judicial Conference of

Some jurists were concerned that proposals like the one to amend Rule 68 were part of a growing trend to restrict access to federal courts in the name of economy and efficiency. At a symposium to consider the state of the civil rules upon their fiftieth anniversary in 1988, Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York discussed the potential of proposed reforms to make it more difficult for Americans to vindicate their rights in federal court.

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Who and what kinds of cases should be welcomed or discouraged from entering the federal courts? What disputes heretofore in federal tribunals should be forced to go to state courts or to alternate forms of dispute resolution? Should our current civil practice, in which self-policing by lawyers often governs litigation, be modified to require federal judges to take control . . . ? . . .

I always expected that “reformers” would work for improvements for all, especially the least fortunate. But of late something seems awry. There appears to be a continuing—and, I believe, intensifying—struggle for control over the federal courts between those who would vindicate the Federal Rules’ aim of smooth and relatively easy access to our tribunals and those who would erect procedural and other barriers to entry. Curiously, it is the courts, not Congress, expressing this restrictive view. . . .

The erection of barriers to court access under the guise of procedural efficiency seems misguided and shortsighted: it will burden the weak and the aggrieved unfairly, and it ultimately will undermine the legitimacy of the legal system which most of these “reformers” hold dear.

Few disagree that the Federal Rules were intended by their drafters to open wide the courthouse doors. The authors sought to air out the courts and let the sunlight of substance shine into them; they were sweeping away the dirt and cobwebs built over centuries of tinkering with process. They employed for this task

the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, 102 F.R.D. 407, 435 (1984).

some available tools—horizontal national uniformity, broader judicial discretion, and the fusion of law and equity. The drafters' commitment was to a civil practice in which all parties would have ready access to the courts and to relevant information, a practice in which the merits would be reached promptly and decided fairly. Every claimant would get a meaningful day in court. In the golden age of federal civil procedure, the federal courthouse was the beacon to which those with serious substantive grievances could turn for direction toward justice. . . .

Concern over excess litigation in the federal courts is old hat. Modern critics like Judges Bork and Posner and Justice Scalia say a "litigation explosion" has taken place since 1960, but even in 1960 prominent jurists like Chief Justice Warren and Judge Wyzanski were complaining about the crisis of federal court congestion. . . .

The truth about the "litigation explosion" is that it is a weapon of perception, not substance. If the public can be persuaded that there is a litigation crisis, it may support efforts to cut back on litigation access. . . .

The "explosion" idea is wrong as a matter of fact: by relatively modest increases in our trial bench and magistrates, we have maintained roughly the same number of cases per judge as we had in 1960. And it is wrong as a matter of policy: if cases are growing in the federal courts, so be it! That is what judges and courts are there to do: to hear cases. We are public servants pledged to do justice, not exalted elites who bless the masses with such bites of judicial time as we deign to dole out. If some judges truly are overburdened, then the first resort should be to add judges or to add support staff, not to shut the courthouse door. On balance, the social costs of adding personnel are likely to be much smaller than the social costs of frustrating important civil and commercial rights. . . .

The anti-access movement should be objectionable to everyone—liberals and conservatives alike—for three reasons. First, whatever the merits of reducing plaintiffs' rights, a system which denies those rights by procedural subterfuge is highly undesirable. Substantive rights should be debated in public, with a full airing of issues, and usually given or taken away only by the Congress or, in some few instances, the Supreme Court. Procedural machina-

tions designed quietly to overload the litigation costs of plaintiffs have the effect of denying substantive rights, but without any of the procedural safeguards attached to public and legislative decision-making.

Second, restricting access unfairly burdens the poor and the aggrieved. The advent of the Federal Rules swung the courthouse door open. They permitted the full development of public law cases and the prompt consideration of the merits. Parties could no longer rely on clever maneuvers, but were required to make their best cases on the merits and face a dispositive ruling or a trial. Federal litigation grew as the federal courts became increasingly hospitable to effective dispute resolution. That growth in the main seems in retrospect highly desirable since it provided the basis for a quantum jump towards equality in fact. . . .

Closing the courts also will distort important policies inherent in the law. If plaintiffs cannot sue tortfeasors easily, deterrence will be frustrated. If sanctions frighten away civil rights lawyers, those behaving in the shadow of the law will risk inflicting more insidious discrimination. If diversity jurisdiction is abolished, some state courts will be seriously strained while large complex cases impinging on many states will be conducted ineffectively.

Third, restricting access to the courts is imprudent. Conservatives interested in conserving the legitimacy of the courts and the judiciary and in sustaining respect for the rule of law should realize that these values are dependent on the public's feeling that they are able to vindicate their rights. It was in fact the conservative supporters of the Rules Enabling Act who sought open access and uniform rules in order to restore the appearance of fairness. . . .

Restricting access to the courts is seriously misguided and shortsighted. It will not alleviate any real "litigation crisis." It will not give order to the quasi-uniform system of Federal Rules. It will not enhance the legitimacy of the legal system. What it will do is deprive individuals and society of important rights and heighten the disaffection and frustration that results from exclusion. Neither liberals nor conservatives should encourage the closing of the courthouse door.

[Document Source: Jack B. Weinstein, "After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?" *University of Pennsylvania Law Review* 137, no. 6 (June 1989): 1902, 1906–1907, 1909–1910, 1919–1922.]



## *Alternative Dispute Resolution*

In addition to enhancing the role of federal judges in managing cases and facilitating settlements, many judges, lawyers, and professors in the late 1970s advocated incorporating alternative dispute resolution methods into the pretrial process in federal district courts. Calls for expanded use of arbitration came first from Chief Justice Warren Burger, who said in 1971, "There are a great many problems that should not come to judges at all and can be disposed of in other ways."<sup>93</sup> Burger extolled the virtues of private arbitration as a more efficient method for resolving small disputes. In his presentation at the 1976 Pound Conference, Frank Sander, a professor at Harvard Law School, called for the establishment of forums in which litigants could choose from a menu of dispute resolution options.<sup>94</sup> Some state judicial systems had already started down this path; Pennsylvania, for example, began an arbitration program in 1952.<sup>95</sup>

The district courts themselves ultimately took the lead in adopting what became known as "court-annexed arbitration." In 1978, three district courts implemented pilot arbitration programs. The pilot courts—the Eastern District of Pennsylvania, the Northern District of California, and the District of Connecticut—referred certain cases with less than \$100,000 at stake, mostly personal injury and contract actions, to a panel of three private attorneys serving as arbitrators.<sup>96</sup> Arbitration in these cases was mandatory, though rulings were not binding and parties could elect a trial *de novo* after arbitration was complete. Connecticut discontinued its program in 1981, but the other two pilot districts had more favorable experiences that led many in the judiciary to believe there was a future for arbitration in the courts.

Other federal judicial districts in the 1980s experimented with ADR methods that included mediation, summary jury trial (a condensed pretrial procedure in which each side presented its case to a

93. *Forbes Magazine* 108 (July 1, 1971), 21–23.

94. Frank E. A. Sander, "Varieties of Dispute Processing," *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 131 (1976).

95. Act of January 14, 1952, No. 590, § 1, 1952 Pa. Laws 2087.

96. Paul Nejelski and Andrew S. Zeldin, "Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story," *Maryland Law Review* 42, no. 4 (1983): 801, n. 87.

jury and received a nonbinding verdict as an aid in settlement negotiations), and early neutral evaluation (in which a neutral party provided an assessment of the strength of each side's case, also as an aid to settlement). Many federal judges saw the implementation of ADR methods in the courts as part of their larger mission to guide cases toward speedy resolution without the expense and delay created by formal trials. The emphasis on diverting cases away from trial, however, led to concern on the part of some judges and lawyers that ADR was an obstacle to the fulfillment of what they saw as the judiciary's true mission: the adjudication of disputes. Ultimately, Congress seemed to give more weight to concerns about efficiency. After considering various legislative proposals in the 1980s and 1990s to expand the use of ADR in the federal courts, Congress enacted a law in 1998 that required each judicial district to devise and implement its own ADR program.<sup>97</sup>

Judge Edwin A. Robson, Benefits of Arbitration, Address to Chicago Advisory Council of American Arbitration Association, December 6, 1974

In the 1970s, federal judges began to discuss their support for greater reliance on mediation and arbitration as an alternative to litigation. After Chief Justice Warren Burger praised private arbitration as a viable alternative to adjudication in 1971, the American Arbitration Association (AAA) capitalized on the moment by submitting a plan to the judiciary to permit federal judges to refer certain cases, such as personal injury lawsuits, to its members for binding arbitration.

In 1974, Chief Judge Edwin A. Robson of the U.S. District Court for the Northern District of Illinois delivered an address to the AAA's Advisory Council in Chicago. Robson praised arbitration for its ability to provide faster resolution of disputes at lower costs than traditional litigation. He also highlighted the fact that arbitrators could be selected for particular cases based on their expertise regarding the complex issues at hand.

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I have labored nearly thirty years in our judicial system (state and federal) and have tried to find an effective solution to our backlog of civil litigation. Many innovations have been conceived, but none meet the test of reducing our ever present problem of judicial

97. Alternative Dispute Resolution Act of 1998, 112 Stat. 2993 (1998).

delay. Several years ago I started investigating an old process “Arbitration.” The end result—I am today after much careful thought an advocate of the arbitral process, used in conjunction with our legal system, as a viable solution to the present congestion in our courts. Some of my friends may call it heresy, but a study of its feasibility makes me believe my conclusion is realistic. . . .

[T]he high quality and expertise of the arbitrator generally produces a more knowledgeable and just decision. . . . In arbitration a panel of experts, nominated for their prominence and familiarity with the particular area in which the dispute occurs, provides the universe from which the selection of the arbitrator takes place.

In one sense, then, the more complex the issues involved, the more valuable the use of the arbitration system. In contrast to the random selection of the jury system, the educated method of determining who will be an arbitrator in a given dispute appears far superior.

The second important advantage of the use of the arbitral system is the speed, with the attendant economy of time and money, with which a proceeding can be commenced and concluded. Rather than have their dispute in a state of lengthy repose on a trial docket, the parties can have their controversy settled in a matter of weeks or months. The current—and proper—priority given to criminal cases augurs poorly for any imminent relief to the protracted delay presently prevalent in the determination of civil matters.

The economy of time inherent in the arbitration system is complemented by an economy of financial resources necessary to maintain the arbitration proceeding. Since the arbitration procedure is not of long duration, the attorneys’ fees are not as high. The amount of paper work involved—briefs, depositions, interrogatories, and various motions, etc.—is considerably less than that accompanying a typical lawsuit. The arbitration hearing usually only takes a day or two (in contrast to the several trips to the court by the parties in a strictly judicial proceeding). The rules of evidence are relaxed in the interest of speed—but not with a lack of interest in the pursuit of justice.

The successful party in the arbitration proceeding has a better opportunity to be truly financially successful than the so-called “winner” of a lawsuit. As has been indicated, there is a low-

ering of lawyers' fees in the arbitration procedure; thus, the usual non-recoverability of attorneys' fees does not pose as insurmountable a problem in the arbitral setting as it does in the usual court proceeding.

[Document Source: Edwin A. Robson, "Arbitration: Panacea for the Congested Court Docket?" *Chicago Bar Record* 56, no. 3 (November–December 1974): 128–130.]

Committee on Federal Courts of the Association of the Bar of the City of New York, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, April 14, 1978

In 1978, the Judicial Conference approved a pilot program whereby three district courts could refer select cases to mandatory, but non-binding, arbitration prior to being considered by a judge. As the pilot districts began their experiments in court-annexed arbitration, Attorney General Griffin Bell (formerly a judge of the U.S. Court of Appeals for the Fifth Circuit) recommended a bill to Congress that would give judicial districts greater flexibility in establishing alternative dispute resolution programs by local rule. Bell was pleased with the pilot programs and saw them as "a valuable warm-up for the main event."

The court-annexed arbitration bill received substantial criticism from lawyers and arbitrators who found the proposed system inferior to private voluntary binding arbitration. The head of the American Arbitration Association lamented that "the primary purpose of this mechanism is to encourage parties to settle more cases by requiring them . . . to go through a mock trial." In a report on the bill that was included in testimony before the Senate Subcommittee on Improvements in Judicial Machinery, the Committee on Federal Courts of the Association of the Bar of the City of New York questioned whether the approach of mandatory, but nonbinding, arbitration would accomplish its purported goals of reducing cost and delay. The report asserted that litigants pulled into arbitration against their will would likely want a *de novo* trial with the result that arbitration would only add to the costs of the case.

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We believe that the proposed legislation is deficient both in concept and in content and that its adoption would be ill-advised. . . .

It is important to keep in mind that, except for the compulsory and non-binding state models from which this proposed legislation has been adapted, arbitration is generally understood to be a *voluntary* method of resolving disputes, one which is usually adopted by the parties prior to a controversy as part of a contractual relationship or which, less frequently, is agreed to as a means of resolution after a dispute has arisen. Equally important, arbitration has been generally recognized as a *final* and binding dispute determination, usually not subject to appeal, much less to retrial. Confidence in private arbitration obviously derives in large measure from past experience based on the voluntary and final nature of the procedures involved. Other factors often make such voluntary final arbitration desirable: the panel of arbitrators may have special expertise, expensive pretrial discovery may be curtailed or eliminated, doubts as to several possible forums may be eliminated, confidentiality may be maintained, continuing business relationships may be fostered, and so on. The mandatory procedure contained in the proposed legislation has few if any of these advantages or benefits. Public confidence in a compulsory scheme of arbitration between litigants who have not voluntarily selected arbitration and for whom it is non-binding is thus questionable.

Although limited pre-trial discovery is occasionally permitted in private arbitration, that is the exception rather than the rule. Here again, private arbitration differs from the scheme of this bill. The bill would allow quite substantial discovery prior to a reference to arbitration. Since the parties have up to 120 days for discovery after the defendant's answer is filed, each side would propound at least two successive waves of interrogatories and requests for document production and could conduct extensive depositions. Although it is unlikely that truly massive discovery will be taken prior to arbitration in cases involving alleged damages of \$50,000 or less, it seems clear that the bill would permit, if not encourage, substantial pre-arbitration discovery. Thus, litigants are not likely to find that the arbitration required by the bill has substantially reduced one of the major costs of federal litigation—pretrial discovery.

Even if the parties accept the arbitrators' determination, the only benefit to litigants will be the possible avoidance of delay before a case reaches the trial calendar and the somewhat shorter hearing time and less expensive preparation for an informal arbitration hearing as compared to a formal trial. However, in cases involving less than \$50,000, we would expect that the cost of preparing for and conducting a formal trial would usually not be substantially more costly than the expenses incurred in arbitration. On the other hand, if the arbitrators' award is not accepted by one of the parties, then the ultimate trial of the action will have been delayed by several months and the cost to litigants of conducting the arbitration proceedings will have added substantially to the expenses of litigation. . . .

Because there will undoubtedly be such cases in the federal courts for which non-binding arbitration is manifestly inappropriate, we believe that the proposed legislation is seriously flawed by its failure to provide any discretion in the trial court to excuse a party from the necessity of going to arbitration. Where both parties wish to avoid arbitration or where one party has a compelling reason for doing so, we believe that it makes little sense to require them to go through what will in all likelihood be a pro forma exercise or perhaps a mere charade.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2253, To Amend Title 28 of the United States Code to Encourage Prompt, Informal, and Inexpensive Resolution of Civil Cases by Use of Arbitration in the United States District Courts*, 95th Cong., 2nd sess., April 14, 1978, 40–43.]

#### U.S. Department of Justice, Ad Hoc Panel on Dispute Resolution and Public Policy, Support for Alternative Dispute Resolution, Report of January 1984

In 1983, the Department of Justice appointed a panel to study dispute resolution in the state and federal courts and to assess the ramifications of ADR programs for the nation's justice systems. The report, released in January 1984, made the case for finding alternatives to formal court litigation. The panel pointed out that a small number of highly complex cases represented a disproportionate drain on judicial resources, with the result that speedy justice for ordinary Americans was increasingly out of reach. For simpler cases,

the panel asserted, ADR programs offered a new path for dispute resolution that was less expensive, less time-consuming, and not as combative and adversarial as traditional litigation in the courts.

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Many experts within the legal establishment are joined by lay critics in believing that the country is suffering from “too many laws, too many lawsuits, too many legal entanglements, and too many lawyers.” Contrary to popular belief, however, the problem does not seem to be excessive litigation. Although there has been a rapid growth in the number of cases filed, only 5–10 percent of filings actually go to trial. The number of cases litigated does not appear to be increasing at a rate faster than the population is growing. . . .

So the issue is not so much one of caseload as of complexity, prohibitive cost, and delay in using the courts. In fact, the United States has the largest bar and the highest rate of lawyers per capita of any country in the world . . . . And yet, it has been estimated that 1 percent of the U.S. population receives 95 percent of the legal services provided. . . .

This is a situation with important implications. Not only is the largest segment of our population precluded from real access to the justice system, the biggest users of legal services—corporations and wealthy individuals—pay an enormous price. Legal expenditures are growing at a rate faster than increases in the gross national product. Productivity is affected by the drain on time and money available for other endeavors.

Enthusiasm for a wider range of dispute resolution options is tied, then, to a hope that new methods will not only reduce the burden on the courts and the economy, but will provide more satisfying means to justice for a larger portion of the population. . . .

The concern expressed repeatedly by the Panel is that courts are simply too expensive and too time consuming. Although the government subsidizes many of the costs of running the courts, their full use requires expensive lawyers and the time of the disputants. This means that courts are generally inaccessible to all but the most wealthy parties. Hence, the courts tend to be the province of large organizations and concomitantly the ten-

year anti-trust case consumes a disproportionate share of judicial resources. Thus, although courts are vitally important for protecting private rights and concerns, the delay and costs may render them ineffective in discharging this critical duty.

Because of the relatively structured approach courts use, the range of remedies available to the court may be quite limited. Indeed, lawyers may have to reframe the issues separating the parties to fit a particular legal doctrine and, thus, may change the nature of the dispute. As a result, the court is often not able to address the real issues and tailor an appropriate remedy.

Courts largely rely on a formal adversarial process that may further antagonize the disputing parties. Thus, a judicial approach may not be the preferred forum for settling disputes in which the parties will continue to have a close working or living relationship. Further, because the process is also somewhat mystifying to many laymen, they may become estranged from the court.

[Document Source: U.S. Department of Justice, Office of Legal Policy, *Paths to Justice: Major Public Policy Issues of Dispute Resolution, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy*, January 1984, 7–10.]

### Federal Courts Study Committee, Subcommittee on the Role of the Federal Courts and Their Relationship to the States, Additional Costs Imposed by Alternative Dispute Resolution, Report of July 1, 1990

After the initial court-annexed arbitration pilot program showed positive results, other district courts began to experiment with different forms of alternative dispute resolution based on their interpretation of Federal Rule of Civil Procedure 16, which instructed judges to facilitate settlements and consider methods of resolution other than standard litigation. The pilot program was expanded in 1985 to include congressional funding for ten federal judicial districts, and in 1988 Congress passed legislation to make the existing ten pilot programs permanent and to authorize the establishment of voluntary arbitration programs in ten more judicial districts.<sup>98</sup>

The 1988 legislation also instructed the Chief Justice to appoint the Federal Courts Study Committee to examine the state of the judiciary and offer recommendations for reforms. As part of its mis-

98. Judicial Improvements and Access to Justice Act, 102 Stat. 4642 (1988).



sion, the committee took stock of the extent to which the emerging ADR programs were increasing the efficiency of the courts. A subcommittee charged with the subject, on which Judge Richard Posner and Representative Robert Kastenmeier of Wisconsin sat, contended that ADR was primarily a tool for reaching settlement, rather than for deciding cases. Posner, Kastenmeier, and others also argued that more often than not, ADR programs were just an additional step in the legal process that required the participation of counsel and therefore imposed extra costs in many cases.

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ADR enthusiasts claim that ADR reduces court congestion by diverting cases from the trial calendar, thereby saving judicial resources, without imposing significant costs. There is, however, little empirical evidence to support these claims, and a number of commentators have argued persuasively that ADR may actually invite more litigation by raising the effective stakes of litigating by depriving potential litigants of authoritative decisions. There is similarly little support for the claim that ADR is less costly, and in the case of mandatory ADR, like the compulsory arbitration and mediation programs, the claim is counter-intuitive: because such a large percentage of cases will end without trial anyway, subjecting many of these cases to compulsory procedures may entail an overinvestment of resources.

On the other hand, it seems quite likely that ADR encourages settlement. Court-sponsored settlement mechanisms increase the cost of trial by imposing an additional layer of procedures that demand attorney time and further expenditures and delay. In other words, ADR itself is an additional transaction cost that must be figured into the cost of litigation, and increasing the costs of litigating undoubtedly produces more settlements.

The question is whether this is an advantage. Imposing additional procedural barriers that facilitate settlement by making it too expensive to get to trial is not likely to enhance the reputation of the federal courts as a place to seek justice.

[Document Source: Federal Courts Study Committee, *Working Papers and Subcommittee Reports*, Volume I, July 1, 1990, 62–63.]

Judge G. Thomas Eisele, Opposition to Mandatory Arbitration,  
Letter to Judicial Conference of the United States, March 8,  
1993

In 1990, the Federal Judicial Center issued a report on mandatory court-annexed arbitration programs and reported that 96 percent of judges had a positive reaction to arbitration in their courts.<sup>99</sup> Based on its study, the FJC recommended that statutory authorization be extended for the existing programs and that all courts be given the option to implement mandatory or voluntary arbitration. In 1993, Representative William J. Hughes of New Jersey, chair of the House Judiciary Committee's Subcommittee on Intellectual Property and Judicial Administration, introduced a bill to make court-annexed arbitration available to all federal courts.

Some judges were still wary of introducing mandatory arbitration to the courts, however. Judge G. Thomas Eisele of the U.S. District Court for the Eastern District of Arkansas made a vigorous attempt to persuade the Judicial Conference to oppose the Hughes bill and to roll back the use of arbitration in the courts. In a letter to the Judicial Conference in 1993, Eisele argued that mandatory arbitration created a further barrier to adjudication before Article III judges, which he saw as the essence of the right to justice. While supporters of the arbitration pilot programs praised the flexibility and innovation achieved by individual district courts working independently, Eisele cautioned that different programs in different courts eroded uniformity of justice within the federal judiciary.

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Even if it could be demonstrated that such mandatory ADR programs reduced court costs and delays in the disposition of civil litigation I would still oppose those programs because they unfairly burden the right of civil litigants to a trial before a judge or a jury. You see I believe that civil litigants should have a meaningful right—rather than a theoretical right—to have their case resolved in a due process, evidentiary based trial before an Article III judge or jury. These mandatory court annexed ADR programs are not “trials” any more than Sentencing Guidelines are “Guidelines.” . . . The decision making is delegated to non-judges. The

99. Barbara Meierhoefer, Federal Judicial Center, *Court-Annexed Arbitration in Ten District Courts* (January 1, 1990), 111.

Rules of evidence are not enforced. There is no right of cross-examination. Indeed the evidence is relegated to a secondary role. In a word, these ADR programs are not just different from the “traditional” litigation-trials in some minor degree; they are different in kind and purpose. . . .

There is a place for alternate dispute resolution programs in our society, but they should not be mandatory and they should not be in, or annexed to, our federal district courts. They should truly be alternatives to, and not a part of, the litigation process. The ADR movement is apparently thriving and that is good. Voluntary out-of-court ADR programs are not only consistent with, but, indeed, complement, our existing due process, evidentiary-based federal trial system. We simply urge the ADR folks to do their thing on their own turf.

The time to stop this alien intrusion is now. . . . Despite all the fan-fare, these mandatory ADR programs are knocking around in only a few of our district courts. Most district judges are only vaguely aware of them. One thing is certain: neither the Congress nor the Courts will long tolerate two separate systems for handling our civil cases. Even the interest in experimentation has its limits. At some point it will be said that the civil litigants in the Northern District of California should no longer be treated differently from those in the Eastern District of Arkansas. At some point it will be recognized that the right of civil litigants in our federal district courts should not be determined by the choice or preference of the federal judges currently holding forth in those courts. The primacy of the rights of litigants will, I trust, at that point be recognized and vindicated. . . .

Federal trial judges can either devote their energy and time to the task of bringing their cases to a condition of trial readiness as quickly as is reasonable and then to the task of promptly trying those cases that are not settled or disposed of upon motions to dismiss or for summary judgement; or, they can spend there [*sic*] time holding settlement conferences, assigning cases to alternate dispute resolution programs, and overseeing their operation. What should trial judges be doing?

[Document Source: G. Thomas Eisele, Letter to Judicial Conference of the United States, March 8, 1993, 2–4.]

## *Class-Action Reform*

A class action is a mechanism by which one or more representative plaintiffs can bring suit on behalf of a large group of people who allegedly suffered harm as a result of the same conduct on the part of a defendant. The modern class action in American legal practice has its origins in the adoption of the Federal Rules of Civil Procedure, specifically Rule 23, in 1938.

In 1966, the Supreme Court, acting on the recommendations of the Judicial Conference's Advisory Committee on Rules of Civil Procedure, adopted major revisions to Rule 23 in order to simplify the various categories of class actions and expand the ability of courts to join multiple claims into a single action. Perhaps the most important provision of the amended rule was that those fitting the criteria for membership in a given class would be bound by the terms of any judgment in the suit unless they took affirmative steps to opt out of class membership. The rule change made it substantially easier for those with small claims for damages to bring suit in federal court. While such individuals would have had little economic incentive to bring suits on their own, the revised rule allowed a plaintiff to aggregate the small claims of millions of individuals, thereby making it worth an attorney's time to pursue a case on contingency in the hopes of winning a large judgment. In many such cases, most class members would not be aware of the suit and therefore might not seek to recover their share of the damages once a settlement or verdict was reached. The focus of class actions therefore shifted from compensating individual plaintiffs to requiring wrongdoers to forfeit their ill-gotten gains.

The revised Rule 23 quickly became the subject of controversy in the business and legal communities, and the next decade or so was characterized by debates over its merits. Business leaders and their lawyers railed against the "litigation explosion" that Rule 23 had allegedly foisted upon them and criticized the judges that took a liberal approach to interpreting the rule's class certification provisions. Opponents of the rule protested that liberal class certification led plaintiffs' attorneys to solicit litigation and that defendants, threatened with the prospect of massive damage awards, were being pressured to settle suits in what amounted to "legalized blackmail." Because class members were not required to take affirmative action to join a suit and often had no interest in the litigation, critics charged that class ac-

tions existed mostly to allow plaintiffs' attorneys to collect large fees from the proceeds of a verdict or settlement. Advocates of class actions countered that they provided the only method by which private citizens could hold large corporations accountable for conduct that caused harm to the public.

Federal judges with large caseloads expressed concern that class actions were overburdening the courts. In most such cases, a great deal of time was spent arguing the question of class certification before the merits of a case could be considered. Managing class-action litigation involved complicated administrative tasks that put a strain on limited judicial resources. While Congress took no immediate action to address the issue, a series of Supreme Court decisions in the late 1960s and early 1970s limited the use of class actions. The most significant was *Snyder v. Harris*, in which the Court put a damper on class actions composed of small individual claims when it ruled that the named class members could not aggregate their claims to reach the \$10,000 minimum amount in controversy for diversity of citizenship or general federal question cases.<sup>100</sup> A large number of class actions continued to be filed under federal statutes with no amount-in-controversy requirement, however.

In the late 1970s, the debate over class actions shifted to address a new legislative proposal that would have created a parallel track to the Rule 23 action. The Carter administration began a campaign for comprehensive civil justice reform, one goal of which was to expand access to federal justice for minorities and the poor. As part of this effort, the Department of Justice attempted to establish a new class-action procedure—a “public action” brought by the department itself—to make aggregate litigation more available to small claimants, achieve greater efficiency in operation, and more effectively deter corporate wrongdoing. The hearings on the Justice Department bill led to debate about the role of the federal government in assisting small claimants and enforcing newly created federal consumer rights. But the proposed legislation failed, and no major reforms to the class-action process were enacted.

Legislative proposals to expand federal jurisdiction over class actions sparked a new round of debates in the late 1990s into the ear-

100. 394 U.S. 332 (1969). The holding in *Snyder* was reaffirmed and extended to unnamed class members by *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

ly years of the twenty-first century—particularly proposals to make it easier for defendants to remove class actions from state to federal court. The proposals arose out of corporate defendants' complaints that they received of unfair treatment in state courts, especially in certain jurisdictions known to be friendly to plaintiffs. The plaintiffs' bar opposed the expansion of federal jurisdiction, asserting that it would effectively end state jurisdiction over class actions and make it harder for their clients to achieve justice in the overburdened federal courts. Congress resolved the debate in favor of defendants by passing the Class Action Fairness Act of 2005, which allowed more class actions to be brought in or removed to federal courts, in part by allowing the aggregation of plaintiffs' claims to meet class certification requirements in actions based on diversity of citizenship.

Abraham L. Pomerantz, Usefulness of Class-Action Remedy,  
*The Business Lawyer*, April 1970

Individual consumers who suffered small losses due to misbehavior by a corporation had little ability to recover damages, despite the fact that the corporation's ill-gotten gains could be massive in the aggregate. Only a few years after the amendments to the class-action rules went into effect, plaintiffs' attorneys and public interest lawyers touted the new procedures as a major advance in providing small claimants with access to federal court justice. The expansion of class actions occurred in concert with a growing public concern about consumer rights. Even after the Supreme Court ruled against the aggregation of plaintiffs' claims to meet the minimum amount in controversy, consumers continued to bring class-action suits under federal statutes.

Securities lawyer Abraham Pomerantz, a pioneer in the use of the class-action lawsuit in the late 1960s, hailed the class action as a "socially useful" tool for protecting the rights of victims who otherwise might not have been able to find a remedy in federal court. The ability to join many claims into a single suit and strip corporations of ill-gotten gains would, Pomerantz believed, be a deterrent to fraudulent and other harmful practices.

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The class action is born of economics—the economics of the client as well as that of the lawyer. Its premise is simple. When the same wrong is done to a large number of people, no one person

generally suffers sufficient damage to justify the expense of hiring a lawyer. The class action device now solves the problem by enabling any member of the class to get a lawyer for free. The lawyer, by invoking class action principles, is able to sue not just for the few dollars lost by his client, but for the often millions of dollars of which the entire class was victimized. The lawyer's motive power is the pot of gold at the end of the rainbow.

The class action is mushrooming throughout the courts of our land. It has become one of the most socially useful remedies in history. Millions of victims of securities frauds, anti-trust violations and an endless variety of consumer wrongs are, thanks to the class action device, now able to gain access to our courts. The court dockets show that they are availing themselves of this opportunity in large, and ever increasing numbers.

Equally significant is the rapidly developing phenomenon of federal, state and city governments discovering the use of the class action as a means of protecting the long helpless consumers. Recently, various states and municipalities, using the class action device, compelled pharmaceutical companies to disgorge \$120,000,000 in settlement of complaints charging price fixing of broad spectrum antibiotics in violation of the anti-trust laws. The beneficiaries were millions of overcharged consumers and the public at large. . . . The cynical doctrine of caveat emptor now becomes caveat vendor!

Heretofore, sanctions against consumer frauds consisted of a fine, injunction, or administrative wrist slapping. Now, the class action is striking at the malefactors' nerve endings: their pocket-books. There is no more persuasive sanction.

[Document Source: Abraham L. Pomerantz, "New Developments in Class Actions—Has Their Death Knell Been Sounded," *The Business Lawyer* 25, no. 3 (April 1970): 1259–1260.]

Milton Handler, Managerial Burden of Class Actions, Address to Association of the Bar of the City of New York, October 13, 1970

By the early 1970s, law reviews and other legal publications were filled with criticism of how judges were implementing the class-action rule. Some judges also took issue with particularly unwieldy

cases allowed to proceed as class actions. Judge Edward Lumbard of the U.S. Court of Appeals for the Second Circuit derided a case that came before his court as “a Frankenstein monster posing as a class action.”<sup>101</sup>

In a 1970 address to the New York City bar, Professor Milton Handler of Columbia Law School argued that the amended Rule 23 did not create greater efficiency in dealing with multiple claims in the federal courts, but instead caused substantial managerial problems for district judges. All that kept the courts from being overwhelmed by the challenge of managing complex class actions, Handler claimed, was that defendants were pressured into settling prior to trial, a phenomenon he decried as “legalized blackmail.”

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The class action has been hailed as “one of the most socially useful remedies in history,” a device which will open up the federal courts to literally millions of small claimants. A similar attitude is reflected in the consumer protection bill which was recently reported by the Senate Commerce Committee which adopts the class action as the apparent panacea for all consumer grievances. A wave of emotionalism has been generated, with the result that anyone who does not enthusiastically endorse consumer class suits becomes an enemy of progress and a disciple of the devil. . . .

In this light, the full extent of the burden imposed upon a court by a massive class suit becomes readily discernible. First, the court must determine the propriety of the class, define it, and identify its members. Then notice must be sent to all potential class members. The numerous inquiries engendered by the notice must be answered. The responses of members opting out must be processed. Once these administrative tasks are completed, the court must then oversee discovery on a gargantuan scale. Defendants will be entitled to transaction data from all class members. They may serve interrogatories or requests to admit, or they may take depositions. Furthermore, since the seventh amendment guarantees defendants a constitutional right to a jury trial with respect to each damage claim asserted, at some point there will have to be

101. *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555, 572 (2nd Cir. 1968).



either a massive trial lasting for years or a multitude of mini-trials with a new jury having to be empaneled in each instance unless trial by jury is waived. True, the facts may permit the court to sever the issue of liability and thus postpone discovery and trial on damages; but if the case is to be litigated, this problem will have to be faced eventually and the load the court will have to carry will not be reduced by the delay. . . .

The easy answer that is often suggested is that defendants, faced with massive class actions, will invariably choose to settle rather than to litigate. It is true that since rule 23 was amended in 1966, no antitrust class action has proceeded through trial to an actual determination of damages. It is also true that many of the problems of rule 23 may be finessed in a settlement context where classes may be established by agreement which might otherwise be improper and a procedure for filing simple statements of claim may be adopted by the parties in lieu of any proof of injury.

But this rationalization suffers from a fundamental flaw. Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace. Furthermore, while the judicial system is less encumbered than it would be if such an action were litigated, the imposition on judicial time is nevertheless substantial. . . .

The foregoing analysis leaves little doubt that massive class actions constitute a net liability for antitrust, for federal courts, and for society generally. . . . The rule was designed to economize judicial resources and to prevent inconsistency of result with respect to common questions by providing for the simultaneous disposition of multiple claims. . . . [T]he rule becomes counter-productive whenever it serves to escalate the litigation process. Thus, when a multitude of small claimants who would not otherwise sue become, willy-nilly, parties to the suit merely because they ignore a

notice, and when attorneys are given an incentive to foment litigation and, considering the realities of the situation, to solicit clients with the assistance of the court, the danger exists that the rule will be used to achieve results diametrically opposed to those intended by its draftsmen. It is difficult to perceive what social purpose is served by inducing those who would not otherwise sue to join the litigation as class members at a time when the courts already have so much business that they are unable to keep abreast with their overcrowded calendars. How much thought, I wonder, has been given to how the administration of justice by our courts would be affected if every wrong committed in our society were to be the subject of suit? This, of course, does not suggest that serious wrongs should go without redress. What it does mean is that it may be wiser to create new machinery for the processing of small claims rather than to wreck the machinery we already have. Before we stimulate demand, we should see to it that our supply is adequate.

[Document Source: Milton Handler, "The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review," *Columbia Law Review* 71, no. 1 (January 1971): 6–11.]

William Simon, Misuse of Class Actions by Attorneys, Speech to Ninth Circuit Judicial Conference, Pasadena, California, July 27, 1972

In a speech before the Ninth Circuit Judicial Conference in 1972, attorney William Simon criticized Rule 23 for encouraging lawyers to bring lawsuits that did not necessarily reflect the interests of their clients. He argued that the rule—especially the provision requiring class members to opt out if they wished not to join a suit—created incentives for attorneys to generate litigation, sometimes without even having to notify class members when settlement occurred early in the process. The proliferation of suits filed simply to allow attorneys to amass large fees, Simon alleged, harmed the integrity of both the bar and the judiciary.

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It cannot be said that the cost of thus converting the Federal judiciary into a small claims court has been offset by any substantial social benefit. The principal—perhaps only—beneficiaries have

been lawyers. In combining great incentive for unprofessional conduct by lawyers with little potential to benefit their clients, the amended Rule, as interpreted by some District Courts, poses serious threats to public confidence in the judiciary and the integrity of the bar. . . .

Certification of a class can transform a relatively simple lawsuit between named parties into a highly complex case involving thousands and even millions of “plaintiffs” who are brought before the court solely by the boilerplate class allegations of a complaint, and their failure to “opt out” in response to “notice” which they may never receive and, if received, may not understand or be interested in. Failure to opt out cannot be interpreted as interest in the class action. This is shown by the fact that in settled cases, where members of the class get an automatic recovery by responding, most of those who do not opt out do not bother to file claims. The result therefore is not the consolidation of many viable claims in a single simplified lawsuit, but rather the generation of claims for people who have no interest in pursuing them. . . .

I have deferred until last the most serious long range consequence of the indiscriminate use of class actions—the undermining of public confidence in the judicial system and the integrity of the bar. Attorneys are members of an honorable profession and are duty-bound to put their clients [*sic*] interests above their own. The spectacle of lawyers reaping enormous profits from lawsuits which do not benefit their clients must be a source of embarrassment to both the judiciary and the bar. As one Court recently warned, both courts and attorneys must avoid the criticism implicit in the Italian proverb that “A lawsuit is a fruit tree planted in a lawyer’s garden.”

The judiciary should not participate in encouraging attorneys to become entrepreneurs who create business opportunities from which they reap large profits. . . .

Rule 23 results in unjust enrichment to some members of the legal profession with little corresponding benefit to the public. And, as defense counsel in many such suits, I say this as a beneficiary of the class action Rule. There is talk of the prophylactic good of the punishment inflicted on defendants in class actions. But our legislative scheme provides for punishment to wrongdoers in actions brought by the Attorney General. . . .

While as defense counsel in class actions I am a beneficiary of these injustices, I would prefer to see the judiciary take a more realistic view of both its capabilities and responsibilities. Massive class actions are an inefficient, unfair, and undependable way of law enforcement. Surely the social benefits of class actions can be provided by mechanisms which will be less injurious to the fundamental rights of the parties and have a less detrimental effect on the integrity of the judiciary and the bar, which will not turn court-houses into casinos, and which will not depend on the threat of financial ruin of defendants in order to be workable.

[Document Source: William Simon, "Class Actions—Useful Tool or Engine of Destruction," 55 F.R.D. 375, 377–378, 390–392, 394 (1972).]

Francis R. Kirkham, Quasi-Legislative Function of Class Actions, Addendum to 1976 Speech to Pound Conference, 1979

Francis Kirkham was a San Francisco attorney who had clerked for Chief Justice Charles Evans Hughes and served as corporate counsel for Standard Oil of California (which later became Chevron) during the 1960s. He actively worked to address problems facing the federal courts, both as a member of the Hruska Commission that examined the federal appellate system and as the chairman of the ABA's Section on Antitrust. In a 1979 addendum to remarks he gave in 1976 at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (known as the Pound Conference), Kirkham criticized the class-action rule as counterproductive. The courts were meant to deal with individual cases and the compensation of individual victims, he argued, but liberal class certification had transformed the judicial process into a quasi-legislative one with an excessive focus on righting social wrongs.

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There are, to be sure, many difficult practical and legal problems that flow from the use of large consumer class actions to recover damages. But from a broad standpoint, these actions have their true significance in terms of the judicial process itself, significance that calls into question the role which the courts play in society. The maintenance of a class action aimed not at "compensation" of injured claimants but at the aggregation of penalties or

the confiscation of “ill-gotten gains” necessarily forces courts into a quasi-legislative role of measuring the social value of the remedy against the social cost of the wrong. Whether courts should do this may well depend upon individual perspective, but that courts are presently required to make this balance is an undeniable and inescapable consequence of the “opt-out” provision of Rule 23. . . .

Under our traditional law, and under our Constitution, the business of the courts is to decide cases and controversies. It may well be questioned whether a proceeding to declare the rights of a person who lacks sufficient interest in his claim to bring himself before the court is justiciable as a case or controversy. In any event, the awarding of damages measure by a *de minimis* injury to a person uninterested in adjudicating a claim, or even in accepting damages when awarded, can only be justified, as noted above, on the assumption that courts should change their role from a “passive one” of dealing in compensation to parties before them to an “active one” of extracting money, in the absence of a controversy, from alleged wrongdoers.

[Document Source: Francis R. Kirkham, “Problems of Complex Civil Litigation,” 83 F.R.D. 497 (1979).]

Vice President Walter F. Mondale, Necessity of Class Actions for Protection of Ordinary Citizens, Speech to Second Judicial Circuit Conference, Buck Hill Falls, Pennsylvania, September 10, 1977

As criticism of practice under Rule 23 grew in the early 1970s, the federal courts continued to rein in the use of class-action procedures. In 1974, the Supreme Court ruled in *Eisen v. Carlisle & Jaquelin* that plaintiffs were responsible for notifying each individual in the prospective class, rather than simply publicizing the suit through advertising, and were required to do so early in the litigation.<sup>102</sup> In the case at hand, that meant notice to 2.25 million potential class members, each of whom had suffered a loss of less than \$4, at a cost of over \$225,000. The plaintiffs’ bar interpreted *Eisen* as a major blow to the pursuit of public interest lawsuits.

Public interest attorneys reacted to the Supreme Court’s decision with calls for reforms that would protect the ability of small

102. 417 U.S. 156 (1974).

claimants to bring class-action suits in federal court. In 1977, the Carter administration set its sights on addressing problems in the courts, including the issue of access to justice. In support of that initiative, Vice President Walter Mondale addressed the Second Circuit Judicial Conference and spoke pointedly about the need to preserve class actions as an avenue for ordinary citizens to assert their rights against large corporations and to pursue social justice.

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As federal judges, you have been on the cutting edge of the fight for social justice in our nation. In recent decades, your courtrooms have become the arena where black Americans and other minorities, the poor, women, and all those denied the full promise of America have come to claim their rightful place. These citizens and millions more continue to look to your courts for justice today.

That is why this conference on guaranteeing access to justice is so important. As federal judges, you understand perhaps better than anyone that the judicial crisis we face today is much more than an administrative problem.

The problems of overcrowded dockets; rising legal costs and mounting delays are not just a headache for judges. They threaten to close the courtroom door on the very people who need judicial relief the most—the poor and the weak, middle income citizens, minorities and the powerless. The procedural logjam clogging our courts excludes millions of citizens for whom justice in the courts is the only hope of overcoming generations of prejudice and neglect. The inability to obtain[] legal services leaves millions more with no access to justice at all. . . .

We must go on to tackle what Judge Kaufman calls the “twin demons” of cost and delay. We must reduce court congestion and overcrowded dockets.

But in all these efforts, it is important to keep in mind that our final goal is not simply to reduce caseloads or merely make our courts run more smoothly. Our goal is, and must be, to provide access to justice for all our people. Judicial reform . . . must preserve the courts, particularly the federal judiciary, as the forum where fundamental rights will be protected and the promise of equal justice under law will be redeemed. . . .

But clearing court dockets and freeing judges' time is only half the battle. We must make sure that those in need of justice receive their day in court. For many citizens today, technical barriers increasingly bar the federal courthouse door. Millions of poor and middle income Americans simply can not afford to go inside.

Access to federal court is often the only way the individual consumer, the taxpayer and the ordinary citizen can effectively challenge the massive power of a modern corporation or the far-reaching power of government itself. Closing the courthouse door leaves then no other place to go.

President Carter and this administration are committed to opening up the judicial system to those in need of its support. In his recent consumer message the President asked the Congress to give citizens broader standing to sue government agencies, to give the federal courts more authority to reimburse legal fees, and to expand opportunities for filing class action suits.

Nothing is more destructive to a sense of justice than the widespread belief that it is much more risky for an ordinary citizen to take \$5 from one person at the point of a gun than it is for a corporation to take \$5 each from a million customers at the point of a pen. Consumer class actions are one of the few ways a nation of individual consumers can defend itself against fraud and deceit in the marketplace today.

The Justice Department is working closely with the Office of Consumer Affairs to develop workable procedures to insure that class actions will be used responsibly.

[Document Source: U.S. House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, *Hearings on State of the Judiciary and Access to Justice*, 95th Cong., 1st sess., 1977, 794–796.]

Assistant Attorney General Daniel J. Meador, Support for Public Actions Brought by Department of Justice, Testimony Before Senate Subcommittee on Judicial Machinery of the Committee on the Judiciary, November 29, 1978

In 1978, the Department of Justice proposed legislation to replace class actions based on small claims with a “public action” prosecuted by the department. An individual would be able to bring a public action in the name of the federal government, but the Justice Department would have discretion to take over the case, to refer the

case to a state attorney general for proceedings in state court, or to recommend to the court that the case be dismissed. The Administrative Office of the U.S. Courts would be responsible for distributing the proceeds of any judgment to individual victims.

Testifying in favor of the bill before the Senate Subcommittee on Judicial Machinery, Assistant Attorney General Daniel J. Meador agreed that litigation in the federal courts played an important role in putting a stop to frauds and other wrongdoing in a mass commercial society. Meador asserted that the class-action procedures of Rule 23 were aimed at individual compensation, while the Justice Department could more efficiently accomplish the most important goal of class-action suits: halting practices that victimized the public.

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[I]s there a need for comprehensive revision of rule 23(b)(3)?  
Our answer to that is clearly yes.

I would like to begin to answer this question by comparing the situation 100 or more years ago with today. Back then, there was quite a different society. One can imagine a person in that age of cottage industry. B handcrafts an item—a widget or what have you, and he sells it to A, and it turns out to be defective or misrepresented in some respect. A has a cause of action against B. If the matter is not settled, he will sue and either win or lose in an action against B. This is the classical, traditional, common law kind of action—one party against one party, or maybe a handful against a handful, a few A's against a few B's. It was a manageable kind of proceeding. Courts could adjudicate it well and give remedies where they were appropriate.

Contrast that situation against the one we have today in a mass production society: Mass production, mass technology, mass marketing, mass advertising with everything on a huge scale involving thousands and millions of people. In this setting where a person manufactures or sells or otherwise promotes a defective product, a misrepresented product, or a fraudulently marketed product, you will not have an injury to just A who can then sue B. There will be thousands of persons maybe million of persons—injured by that single course of allegedly unlawful conduct.

The prospect of a million A's filing lawsuits against B is an appalling prospect. If that were the only recourse available, we would have a breakdown of the judicial system. The system would



simply shortcircuit. It is not equipped to handle a million lawsuits against a single party or rising out of a single course of conduct. Moreover, it would make no sense to manage the matter that way. So the procedural problem we face today in this mass society is one of conforming and fitting procedures to the circumstances of the times. In other words, in a mass production society, we need a lawsuit tailored to mass injury.

That is the idea of the contemporary class action under rule 23(b)(3). The Advisory Committee on Civil Rules, the framers of the rule in 1966, attempted to address the problem. It was an innovative and bold step at that time, but it moved out into uncharted territory. It was an admirable experimental effort. We have learned much from it. The rule has served useful purposes in many situations, but, at the same time, it has generated a great many problems.

Our view, which I believe is widely shared, is that the time has come to revamp that procedure in a comprehensive way, not by piecemeal pruning here and there. One reason why we need a comprehensive revision is that rule 23(b)(3) is premised on a traditional theory of compensation for economic loss. This is a long-standing fundamental theory of Anglo-American lawsuits.

We realize from experience and a survey of the conditions in society that, while this is a legitimate objective, the primary consideration in these mass, small-injury cases, as the Attorney General has said, is not primarily to compensate the individual but to prevent the wrongdoing and to prevent the wrongdoer from benefiting from his wrongdoing. When examined realistically, the injury is really to the public rather than to individuals. Since the premise of rule 23(b)(3) is compensation, it follows that the rule is working well to advance the public interest. . . .

[R]ule 23(b)(3) . . . is constructed on a premise and for a purpose which does not allow it to achieve what is recognized as the public purpose of preventing in these mass situations unjust enrichment from wrongdoing and deterring similar conduct. So we have redone the rule to achieve the public purpose. The public action amalgamates the harm to the public into a single claim maintained in the name of the United States.

The beauty of the action is that it brings the executive branch of Government into the picture to oversee these cases, perform a screening function, and to assure that the wrongdoing does

not remain unredressed and the wrongdoer left to profit from his wrong. However, the way is left open for one or more of the injured persons to initiate the action. The bill does not rely solely on a Government agency, but the Attorney General is left with a large measure of screening authority and control.

A single recovery is paid into court. The payments to the injured persons are handled by an administrative agency. This is advantageous because the distribution by the judiciary of payments of thousands or millions of small claims is not what the judiciary is designed to do. So we take that out altogether and put it in the administrative agency while there is compensation for those injured, the public purpose is made the primary objective.

[Document Source: U.S. Senate, Subcommittee on Judicial Machinery of the Committee on the Judiciary, *Hearings on Reform of Class Action Litigation Procedures*, 95th Cong., 2nd sess., 1978, 7–8.]

Bruce Meyerson, Opposition to Public Action, Testimony  
Before Senate Subcommittee on Judicial Machinery of the  
Committee on the Judiciary, November 29, 1978

During the 1960s and 1970s, Congress created a host of new federal rights but did not always provide a detailed statutory scheme for enforcement of these rights. Instead, many laws allowed members of the public to act as private attorneys general by bringing lawsuits for statutory violations. It was in this context that public interest attorneys objected to the Department of Justice's proposal to create the public action, which would diminish the role of private litigation in favor of greater governmental control. Bruce Meyerson of the Arizona Center for Law in the Public Interest testified to a Senate subcommittee that federal administrative agencies were not equipped with the resources to adequately police violations of consumer statutes. The federal courts were integral, he argued, to giving ordinary citizens a forum for enforcing their own rights.

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The two policy objectives which I think you should keep in mind in reforming rule 23(b)(3) are, first, the class action mechanism must relate to deterring violations of consumer legislation and other laws designed to protect the public interest. Second, I

think it is important to maintain a vigorous private sector involvement in that deterrent function. . . .

Right now, we have about 40 Federal agencies that are dealing, in one way or another, with enforcing consumer laws. Each State generally has a consumer protection office, either in the Attorney General's office or in an independent agency. Yet, in spite of this continuing increase in public sector commitment to enforcement of consumer legislation, the problems continue. The chamber of commerce estimates that consumer fraud and other business violations add about \$20 billion a year to the cost of products. Antitrust violations add hundreds of billions of dollars a year. In other words, the public sector has not adequately deterred violations of existing legislation.

Therefore, I would suggest to you that in reviewing rule 23(b)(3) and in making any modifications you keep preeminently in mind that the rule does have and ought to have a deterrent and salutary purpose. In achieving that deterrent function, I would suggest that you should keep a vigorous private role in enforcing consumer legislation. I suggest this for three reasons.

Assuming the private sector has the financial wherewithal to do so, I think history demonstrates that private interest will more adequately and vigorously protect their own interests than will the Government. The track record of Government has not been particularly good with respect to enforcing this legislation. In spite of such exemplary efforts by persons such as Mr. Reed in Arizona and some of the other assistant attorneys general here today, I think even they would agree that the offices of the public sector have just been hitting the tip of the iceberg. The final reason I think it is important to keep the private sector actively involved is that in today's economy I think the public is looking askance at increased Government involvement and new bureaucracies to protect public rights. I think that in today's climate, political and economic, there is a strong argument to be made for enhancing the private sector rather than establishing new bureaucracies to protect public rights.

With those two policy objectives in mind, a deterrent purpose for rule 23(b)(3) and any reforms, and also how the private sector would [play] a key part in that, I would like to examine three obstacles which are presently preventing the achievement of these

policy objectives and discuss how S. 3475 does or does not deal with those obstacles. . . .

S. 3475 attempts to deal with the first problem, that is, the financial limitations on detection and prosecution of wrongs, by establishing a public action which gives a right to the United States to litigate on behalf of the class that has been adversely affected by the defendant's wrongdoing. I think the basic premise here is that the United States or the States attorneys general offices will have the financial wherewithal to identify these wrongs and actively and vigorously prosecute them. I would suggest to you, however, that far too much power has been given to the U.S. Attorney General with respect to the control of the public action. . . .

It seems to me that if we go back to one of our policy objectives of maintaining a vigorous rule for private enforcement, then the present bill tips the scales far too heavily in favor of usurping the role of private enforcement and giving great new powers to the Attorney General. . . .

It seems to me that the proper role here is for a dual enforcement responsibility. The U.S. Attorney General and the State attorneys general ought to be involved, but they should share responsibilities with private enforcement, and one should not usurp the other. I think both sectors, working in tandem, would bring about more effective enforcement. If we are truly concerned about addressing the issue of detecting widespread wrongs and in enabling a greater vindication of consumer rights, then we might want to consider other alternatives to this problem.

[Document Source: U.S. Senate, Subcommittee on Judicial Machinery of the Committee on the Judiciary, *Hearings on Reform of Class Action Litigation Procedures*, 95th Cong., 2nd sess., 1978, 87–89.]

J. Fred Byset and M. Kendall Fleehty, *Excessively Punitive Nature of Public Action*, Testimony Before Senate Subcommittee on Judicial Machinery of the Committee on the Judiciary, November 29, 1978

The business community was also wary of the DOJ proposal to replace certain class actions with the public action. Representatives of the U.S. Chamber of Commerce J. Fred Byset and M. Kendall Fleehty submitted a statement to a Senate subcommittee arguing that enforcement of federal laws should be handled by existing

governmental authorities, and that the public action would impose additional and unwarranted penalties upon business defendants. In addition, Byset and Fleeaharty protested that the public action would require greater executive and judicial bureaucracy while infringing upon private legal affairs. Lastly, they asserted, the public action possessed the attributes of class actions that businesses found most oppressive: the ease of bringing lawsuits and the pressure upon defendants to settle.

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We oppose the creation of a new class action vehicle in the form of a public suit in the name of the federal government.

When it developed the original draft of this bill, the Department of Justice recognized, as have others, that class actions sometimes do little to compensate consumers for economic loss, especially when the claims of individual class plaintiffs are small. Much of the recovery in a consumer class action is often dissipated before the injured consumers are compensated. Costs and attorneys' fees take their toll; however, many consumers show little interest in asserting claims.

Under the proposed public penalty procedure, the amounts determined to be due members of the class become a massive penalty paid to the government like a fine in a criminal case. Class plaintiffs, or more precisely their lawyers, become prosecutors.

There are already sanctions, in many cases large ones, for violation of laws under which class actions could be brought. The thrust of the new "public action" is to add additional penalties against wrongdoing. Indeed, class actions are typically so complex and costly to defend that the action itself is a penalty which bears as heavily on innocent defendants as on guilty ones. We submit that if punishment is the purpose, it should be imposed by the normal public processes under which responsible judgment is more likely to be exercised before a decision to prosecute is made. Moreover, if punishment is the purpose, the defendant is entitled to receive the same constitutional safeguards ordinarily associated with the judicial process.

If new ways of punishing wrongdoing are to be devised, they should bear an appropriate relationship to the seriousness of the wrong and the culpability of the wrongdoer. In other words, the

punishment should fit the crime. The vehicle provided by this bill is singularly unsuited for this purpose since, among other reasons, the economic consequences that may be connected with alleged law violations are likely to be huge. These consequences depend not at all on the degree of guilt associated with the offense. For example, adverse findings on conduct in the frontiers of the antitrust law would be punished as severely as hard core price fixing. The practical effect of the bill would be a massive escalation of penalties in both areas. . . .

Behind the bill is a clear assumption that every allegation of business misconduct is true—and that ways to bring about speedy retribution must be found. At the same time, there is an acknowledgement that class proceedings against defending businesses must observe some degree of ostensible fairness. The inescapable result is an entanglement of cross-purposes.

The proposed public action brought by a private party in the name of the federal government under Section 3001(c) will illustrate. Before the action can proceed, the Department of Justice must review the case and exercise one of several options: let the private party proceed; take over the case itself or in cooperation with private lawyers; assign the case to a state attorney general; or ask the court to dismiss the action. On top of that, any state attorney general receiving an assignment from the Department of Justice would have similar options to take over, stay out, or ask the court to dismiss. All of this would occur under more regulations to be developed by the Department of Justice and at a time when the whole country is looking for ways to get the government out of private affairs.

[Document Source: U.S. Senate, Subcommittee on Judicial Machinery of the Committee on the Judiciary, *Hearings on Reform of Class Action Litigation Procedures*, 95th Cong., 2nd sess., 1978, 437–438, 440–441.]

Arthur R. Miller, Opposition to Changes to Class-Action Rules, *Harvard Law Review*, January 1979

In an influential piece published in 1979, Arthur Miller, a professor at Harvard Law School who had served as an assistant on the Advisory Committee on Rules of Civil Procedure that rewrote Rule 23 in 1966, and had recently been appointed Reporter to the Committee, defended the existing form of class-action suits. Class actions, he ar-

gued, were an outgrowth of the increasing complexity of litigation—along with the proliferation of new rights created by Congress—and not the cause of it.

Miller counseled against any major changes to the class-action rules, arguing that both judges and lawyers had become more skilled at managing such cases. He opposed the Department of Justice's proposed legislation on the grounds that a statute should not replace the flexibility and innovation characterizing existing federal class-action practice. Miller's view carried the day, as the bill was not reported favorably by the Senate Judiciary Committee and the controversy over class actions largely faded from public discussion.

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[D]espite the attention that has been riveted on rule 23, we have precious little empiric evidence as to how it actually has been functioning, in terms of either its alleged benefits or supposed blasphemies. Even if the negative effects of class actions were assumed, they would have to be balanced against the societal benefits derived from deterring socially proscribed conduct and providing small claim rectification—considerations that thus far have escaped measurement and perhaps always will.

The available information suggests that much of the debate has been based on erroneous assumptions. It indicates that rule 23 is achieving some of its intended purposes and may well be providing systemwide economies in several contexts, even though small-claim, large-class damage cases have proven extremely resistant to expeditious processing. Although there have been instances of undesirable or unprofessional conduct, abuse does not appear to have been widespread. . . .

It is important in understanding the class action debate to realize that the "big case" phenomenon transcends the class action. The "big case" is an inevitable byproduct of the mass character of contemporary American society and the complexity of today's substantive regulations. It is a problem that would confront us whether or not rule 23 existed. Indeed, it is becoming increasingly obvious that the traditional notion of civil litigation as merely bilateral private dispute resolution is outmoded. Since our conception of the roles of judges and advocates is based on this tra-

ditional view, the ferocious attack on the class action may reflect anxiety over the growing challenge to the model's immutability.

This apprehension should be stated even more broadly. In my judgment, Federal Rule 23 is being used as a convenient scapegoat for grievances against our civil litigation system and trends in our society whose roots lie far deeper than the procedural aspects of practice under that rule. Our preoccupation with the so-called "class action problem" represents a misdirection of attention and energy, which might be better expended recalibrating the structure of litigation in light of contemporary conditions. Accordingly, the thesis of this essay is that drastic revision of class action practice at this time, either by legislation or rulemaking, would be tantamount to attempting a cure by treating one symptom of an ailment rather than dealing with its underlying cause. Any attempt at modification now not only runs the risk of being an overreaction to the argumentative din of the past few years, but seems particularly ill timed because . . . class action practice under existing rules appears to be stabilizing. . . .

[We are in a] period characterized by increasing sophistication, restraint, and stabilization in class action practice. . . . The shock waves sent out by *Snyder*, *Zahn*, and *Eisen* have encouraged many plaintiffs' lawyers to be much more precise and careful. By defining their classes and describing the scope of their claims realistically, they are acting more responsibly than before. The result is that classes have become more reasonable aggregations of litigants, thus reducing the manageability problems created by sheer class size. In addition, plaintiffs' lawyers are beginning to recognize that there may be good reasons, such as the danger of getting trapped in the morass of giving notice and securing judicial approval of any settlement required under rule 23, to resist the almost reflexive impulse to seek class action treatment. For their part, judges are now sensitive to the desirability of requiring counsel to make full factual presentations on questions of certification, settlement, and fees. Finally, defendants are becoming somewhat less intransigent in their opposition to requests for class certification, at least in restraining their use of boilerplate arguments against it. . . .

In my judgment, the Justice Department's approach is an overreaction to a problem whose dimensions have been overstated.



[Document Source: Arthur R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem,'" *Harvard Law Review* 92, no. 3 (January 1979): 666–668, 680, 692.]

Representative Bob Goodlatte, Need for Expansion of Federal Jurisdiction Over Class Actions, Testimony Before House Committee on the Judiciary, May 15, 2003

U.S. Representative Bob Goodlatte, a Republican from Virginia who later became chair of the House Judiciary Committee, introduced the legislation that was eventually enacted in substance as the Class Action Fairness Act of 2005. Goodlatte and other supporters of expanding federal jurisdiction over class actions pointed to inconsistent standards for class certification in the state courts as well as abusive practices resulting in unfair treatment of defendants in certain jurisdictions alleged to be overly friendly to plaintiffs. The law Congress enacted provided for federal jurisdiction in class actions with minimal diversity of citizenship when the class members' claims, in the aggregate, were valued at more than \$5 million.

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This much-needed bipartisan legislation corrects a serious flaw in our Federal jurisdiction statutes. At present, those statutes forbid our Federal courts from hearing most interstate class actions—the lawsuits that involve more money and touch more Americans than virtually any other type of litigation in our legal system. . . .

In recent years, state courts have been flooded with class actions. As a result of the adoption of different class action certification standards in the various states, the same class might be certifiable in one state and not another, or certifiable in State court but not in Federal court. This creates the potential for abuse of the class action device, particularly when the case involves parties from multiple states or requires the application of the laws of many States. . . .

The existence of State courts that loosely apply class certification rules encourages plaintiffs to forum shop for the court that is most likely to certify a purported class. In addition to forum shopping, parties frequently exploit major loopholes in Federal jurisdiction statutes to block the removal of class actions that belong in

Federal court. For example, plaintiffs' counsel may name parties that are not really relevant to the class claims in an effort to destroy diversity. In other cases, counsel may waive Federal law claims or shave the amount of damages claimed to ensure that the action will remain in State court. . . .

Our bill is designed to prevent these abuses by allowing large interstate class action cases to be heard in Federal court. It would expand the statutory diversity jurisdiction of the Federal Courts to allow class actions cases involving minimal diversity—that is, when any plaintiff and any defendant are citizens of different States—to be brought in or removed to Federal court.

Article III of the Constitution empowers Congress to establish Federal jurisdiction over diversity cases—cases between citizens of different States. The grant of Federal diversity jurisdiction was premised on concerns that State courts might discriminate against out of State defendants. In a class action, only the citizenship of the named plaintiffs is considered for determining diversity, which means that Federal diversity jurisdiction will not exist if the named plaintiff is a citizen of the same State as the defendant, regardless of the citizenship of the rest of the class. Congress also imposes a monetary threshold—now \$75,000—for Federal diversity claims. However, the amount in controversy requirement is satisfied in a class action only if all of the class members are seeking damages in excess of the statutory minimum.

These jurisdictional statutes were originally enacted years ago, well before the modern class action arose, and they now lead to perverse results. For example, under current law, a citizen of one State may bring in Federal Court a simple \$75,001 slip-and-fall claim against a party from another State. But if a class of 25 million product owners living in all 50 states brings claims collectively worth \$15 billion against the manufacturer, the lawsuit usually must be heard in State court.

This result is certainly not what the framers had in mind when they established Federal diversity jurisdiction. Our bill offers a solution by making it easier for plaintiff class members and defendants to remove class actions to Federal Court, where cases involving multiple State laws are more appropriately heard. Under our bill, if a removed class action is found not to meet the requirements for proceeding on a class basis, the Federal Court would

dismiss the action without prejudice and the action could be re-filed in State Court. . . .

This legislation does not limit the ability of anyone to file a class action lawsuit. It does not change anyone's right to recovery. Our bill specifically provides that it will not alter the substantive law governing any claims as to which jurisdiction is conferred. Our legislation merely closes the loophole, allowing Federal Courts to hear big lawsuits involving truly interstate issues, while ensuring that purely local controversies remain in State Courts. This is exactly what the framers of the Constitution had in mind when they established Federal diversity jurisdiction.

[Document Source: U.S. House of Representatives, Committee on the Judiciary, *Hearing on H.R. 1115, Class Action Fairness Act of 2003*, 108th Cong., 1st sess., 2003, 67–68.]

Brian Wolfman, Opposition to Effectively Eliminating State Court Jurisdiction over Class Actions, Testimony Before House Committee on the Judiciary, May 15, 2003

The plaintiffs' bar generally opposed legislative proposals to expand federal jurisdiction over class actions. Representative of their position was the hearing testimony of Brian Wolfman, an attorney for the Public Citizen Litigation Group, a consumer advocacy organization. Wolfman told the House Judiciary Committee that the legislation at issue would virtually destroy state jurisdiction over class actions, even in cases involving the law of only one state, and would make it more difficult for plaintiffs to achieve justice in the overburdened federal courts. Disputing the claims of Goodlatte and others that unfair class certification procedures in the state courts was at a crisis point, Wolfman asserted that corporations wanted easier access to federal courts because defendants tended to obtain more favorable outcomes there. Wolfman's arguments did not persuade lawmakers, who expanded defendants' ability to remove class actions to federal court by passing the Class Action Fairness Act of 2005.

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As explained below, the bill would effectively eliminate state-court jurisdiction over class actions involving *only* in-state plaintiffs and *only* that state's law, as long as *any* primary defendant's principal place of business or state of incorporation is out of state, even

where that defendant does substantial in-state business. As a result, the bill effects an enormous shift in class action cases from state to federal courts at a time when the federal courts are already overwhelmed. . . .

H.R. 1115 is, in reality, a “Defendants’ Choice of Forum Act,” since it allows the corporate defendants—not the plaintiffs—to select the court system they prefer. . . .

H.R. 1115 dishonors the proper spheres of the states and the federal government in our federal system. The bill is a resounding vote of “no confidence” in our state courts. It is premised on a deep—and misplaced—distrust in state courts’ ability to uphold the law. Our Constitution properly assumes that the states are fully capable of interpreting their own laws and handing out justice impartially. . . .

The proponents of H.R. 1115 try to justify the bill on the ground that there is a class action “crisis” peculiar to the state courts. . . . As noted at the beginning of this testimony, Public Citizen recognizes that class action abuse threatens to sour the public on class actions and harm the very people that the class action tool is supposed to help. But it is wrong to think that abuse is limited to state courts. . . .

The state courts can play an important role in preventing abuse. When the corporate community began pushing the legislation that is now H.R. 1115, it relied on anecdotes from class actions in Alabama where, the argument went, the state courts had been certifying classes without following reasonable procedures. Responding to due process and forum-shopping concerns from corporate defendants, however, the Alabama Supreme Court has abolished the practice of certifying class actions before the defendant has an opportunity to answer the suit. The Alabama court made clear that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied. State courts have been vigilant in other cases as well. In sum, there is no crisis in the state courts. . . .

There should be no mistaking why this bill’s proponents want class actions moved to federal court. . . . To quote from a recent law journal article written by two corporate class action defense lawyers: “As a general rule, defendants are better off in federal

court . . . there is generally a greater body of federal law precedent favorable to defendants.”

Some of the advantages are obvious, such as the fact that federal judges often feel obliged to interpret state laws conservatively and reject novel claims. Others are more subtle. Currently, Public Citizen’s Congress Watch is compiling a comprehensive report on the class action suits settled by the industries lobbying for this bill. The report’s preliminary findings indicate that each of these industries, including insurance, tobacco, retail, automotive, and other giants, have fared much better in federal courts than state courts. Much of the advantage comes from the federal courts’ overly restrictive interpretation of certification rules. . . .

In sum, H.R. 1115 should be rejected as unwise and unnecessary. It is an unfair attack on the integrity of the state courts and their ability to provide justice to their citizens, and it comes at a time when the federal courts are unable to handle the enormous increase in caseload that H.R. 1115 would produce.

[Document Source: U.S. House of Representatives, Committee on the Judiciary, *Hearing on H.R. 1115, Class Action Fairness Act of 2003*, 108th Cong., 1st sess., 2003, 28–30.]

## *Judicial Panel on Multidistrict Litigation*

Federal courts in the mid-twentieth century were burdened not only by sharp growth in the number of cases filed, but also by the increasing complexity of federal litigation. A significant phenomenon was the emergence of more cases involving multiple parties and issues, resulting in protracted litigation that slowed down the operation of the courts. In 1955, Chief Justice Earl Warren appointed the Study Group on Protracted Litigation—a panel of judges chaired by Judge Alfred P. Murrah of the Tenth Circuit (later the director of the Federal Judicial Center)—to undertake a study of complicated civil and criminal trials. The group’s work resulted in the 1960 publication of the *Handbook of Recommended Procedures for the Trial of Protracted Cases*, a forerunner of the Federal Judicial Center’s *Manual for Complex Litigation*.

In the early 1960s, the country’s industrial and economic growth presented the courts with a new challenge: multiple litigation, or collections of separate cases based on common events that were filed in numerous federal judicial districts. The first major instance of multi-

ple, or multidistrict, litigation involved electrical equipment antitrust cases. The Department of Justice's successful 1961 prosecution of electrical equipment manufacturers for antitrust violations sparked the filing of nearly 2,000 private civil damage suits, comprising over 25,000 claims, in 35 district courts.<sup>103</sup> These cases were based on the same set of alleged facts and involved common evidence, including witness testimony. In 1962, Chief Justice Warren appointed the Coordinating Committee on Multiple Litigation in the District Courts, headed by Judge Murrah, to provide advice on methods for streamlining and consolidating pretrial procedures in such cases. The committee strove to expedite discovery by arranging national depositions of witnesses and establishing centralized document repositories. In consultation with attorneys and district judges, the Murrah Committee drafted national pretrial orders, which were adopted by individual courts, to implement these measures. The new procedures aided in moving the electrical equipment cases towards disposition, and by 1966 only thirty of them remained on the district court dockets.<sup>104</sup>

The Judicial Conference instructed the committee, based on its experience with the electrical equipment cases, to develop proposed legislation to address future multidistrict cases. In 1965, the committee drafted a bill to create a permanent body, the Judicial Panel on Multidistrict Litigation (JPML), which would have binding authority to consolidate and transfer pretrial discovery to a single district court for two or more cases arising from common facts but filed in different districts. The Judicial Conference approved of the proposed bill and submitted it to Emanuel Celler, chair of the House Judiciary Committee, who introduced it.

Debate regarding the proposed JPML centered on the issue of access to the federal courts, and access to one's chosen forum in particular. Supporters of the legislation argued that the judiciary needed new institutions to aid it in the efficient handling of increasingly complex litigation and that simply adding new judges would not serve this purpose. Many attorneys practicing in federal court, however, worried about the effects that consolidating pretrial procedures would have on

103. Statement of Senator Joseph D. Tydings and Testimony of Judge Edwin A. Robson, U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 3815, A Proposal to Provide Pretrial Consolidation of Multidistrict Litigation*, 89th Cong., 2nd sess., 1966, pt. 1, 2, 5.

104. *Ibid.*, 11.

their clients' access to justice. They feared that moving pretrial discovery to faraway judicial districts would increase the cost of litigation and that having judges try cases for which they were not involved in pretrial procedures would harm the quality of justice. Despite these objections, Congress established the JPML in 1968 and gave it the power to transfer pretrial procedures in multidistrict litigation to a single district upon a finding that the transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

Henry W. Sawyer III, Opposition to Judicial Panel on  
Multidistrict Litigation, Speech to Third Circuit Judicial  
Conference, September 10, 1965

Strong support for the JPML existed within the judiciary, as many judges believed it to be a necessary answer to the costs and inefficiencies of processing multidistrict cases. Litigation attorneys, however, raised concerns about the proposal's potential effect on the courts' ability to provide justice. For Henry Sawyer, a prominent defense attorney who spoke at the Third Circuit Judicial Conference in 1965, the JPML threatened to erect an administrative apparatus that severed the connection between counsel and judge. Sawyer contended that the judiciary favored the creation of the JPML solely because of its experience with the electrical equipment cases and therefore was attempting to institutionalize a practice that did not necessarily require permanent existence.

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[T]he one further misgiving that I have . . . is a tendency that I hope doesn't happen . . . of institutionalizing a segment of the court's activity by . . . setting up a kind of permanent office. . . . [T]here is a tendency in all human endeavor . . . that you have people, they are able people, they are dedicated people and maybe you ought to find something for them to do. I hope, therefore, that a combination of the idea that this was a shattering pragmatic success—and I query that—and the presence of a potential institution which can grow and the need to find something for them to do will not result in a kind of an institutionalized branch of the judicial system in which cases that really are not amenable to this specialized treatment are forced into that mold because it looks like it worked once before and because there are people waiting there

to have something to do. I think it would be bad if the courts, even in this branch, became more like the administrative agency sort of law that we have in other areas. The contact between counsel and the judge on the bench is a valuable one, and the institutionalized judgments that might be made by others—even in terms of administration—I think is perhaps potentially a little bit worrying.

My final thought is that in the conferences I go to occasionally we hear more and more about backlog, backlog, backlog, backlog, and I wonder sometimes whether or not we are not losing sight of the fact—and I think it is a fact—that the administration of justice is not an end in itself. It is only a means to get to justice. And that if we keep streamlining and keep cutting corners and keep in some cases pressuring—that is what it is—we may be worrying too much about the *administration* and not enough about justice. If we have to have a backlog in order to have justice, let us have a backlog. History will not judge the viability of our judicial system by saying, in 1,000 years, “It was a sterling judicial system. They had almost no backlog.” I am concerned because there is such a tremendous emphasis on it.

Sometimes we on the defense side in the electrical cases did feel that there was a little bit more administration than justice because of this tremendous pressure that was going forward by the judges, very rightly, in order to bring these cases to trial. I think we have to be careful that we do not begin to overdo that aspect of the whole picture.

[Document Source: Third Judicial Circuit of the United States, Proceedings of the Twenty-Eighth Annual Judicial Conference, “The Impact of the Electrical Anti-Trust Cases Upon Federal Civil Procedure,” 39 F.R.D. 512–513 (1966).]

Judge Alfred P. Murrah, Need for Centralized Control over Multiple Litigation, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary, October 21, 1966

Judge Alfred Murrah of the Tenth Circuit was perhaps more intimately involved in studying the problem of complex litigation in the federal courts than any other judge, having done so in various capacities since 1955. Murrah, in a sense, wrote the book on the subject as head of the group that produced the *Handbook of Recommended Procedures for the Trial of Protracted Cases* in 1960. The judge



appeared before the Senate Subcommittee on Improvements in Judicial Machinery in 1966 to express his support for the creation of a centralized body to oversee the consolidation of pretrial procedures in multidistrict federal litigation.

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As you are fully aware, a virtual “explosion” of litigation has occurred since World War II in all levels of the judiciary. Courts have received and are continuing to receive additional numbers of judges and court personnel. Perhaps this is inevitable in view of the “population explosion” and our expanding economy. But experience has shown and the Judicial Conference of the United States has recognized that the creation of additional judgeships is not the complete answer to the management of judicial caseload. Despite more judges the backlogs of cases continually grow. It is our view that the courts must learn better ways of handling litigation efficiently through the development of new techniques of calendar control and overall judicial administration.

The proposed legislation we are concerned with here today deals with a facet of this overall problem. It is a new and intriguing problem—because it is one peculiar to our modern society. It is the “big case” with geographical dispersion. . . .

At the time of the promulgation of the new *Handbook [of Recommended Procedures for the Trial of Protracted Cases]*, no one could foresee the deluge of antitrust litigation about to descend upon the United States district courts. In 1951 . . . there were 262 antitrust cases commenced in the district courts; in 1960 . . . there were 315 antitrust cases commenced. But in 1962 the number of antitrust cases docketed in the district courts increased to 2,079. This resulted, of course, from the 1,739 private antitrust cases filed that year as the result of the indictments and convictions in the electrical equipment industry in Philadelphia in 1961. While the *Handbook* showed the way in litigation confined to a single district, it provided little help in the coordination of thousands of related cases pending in more than 30 jurisdictions across the nation. . . .

The one principle that stands out foremost in the work on the electrical equipment cases is the need for centralized judicial control to avoid duplication of time and effort and the waste of funds. In the electrical cases control was splendidly achieved

through judicial cooperation and through the cooperation of members of the Bar. While the necessary control was achieved, it was done so only through hard work. It was apparent from this experience that a loosening of the statutes relating to venue and the transfer of cases in relation to multi-district cases, was not only desirable but necessary. The bill which you have before you, which bears the endorsement in principle of the Judicial Conference of the United States, would accomplish just this.

Mr. Chairman, the Federal judiciary in the last ten years has, on its own resources, made immense strides forward in mastering the protracted and complex case. Certainly, the big case no longer threatens, as it once did, a breakdown in the judicial process. In this instance, we ask the Congress to join with us to provide additional tools to help us in the task of the administration of Justice.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 3815, A Proposal to Provide Pretrial Consolidation of Multidistrict Litigation*, 89th Cong., 2nd sess., 1966, pt. 1, 51–53.]

Judge Edwin A. Robson, Support for Judicial Panel on Multidistrict Litigation, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, October 20, 1966

Judges who testified in favor of creating the JPML praised the work of the Murrah Committee and stressed that the electrical equipment cases were just the beginning of what they expected to be a constant flow of multidistrict federal litigation. Judge Alfred P. Murrah, who led the judiciary's study of the issue, stated that "this multiple-district litigation can very well break our backs out of sheer weight of numbers unless we do have an orderly procedure for it."

Judge Edwin Robson of the U.S. District Court for the Northern District of Illinois, testifying before the Senate Judiciary Committee's Subcommittee on Improvements in Judicial Machinery, noted that federal law already permitted the transfer of an entire case to a new district, but included no provision for transfer back to the original district for trial. The JPML was hailed as the best way to bring

modern management techniques to bear on the problem of court congestion caused by complex multidistrict litigation.

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It is the coordinating committee's viewpoint that we were not named just to deal with antitrust litigation. We were named to deal with and to consider ways and means of handling all types of multiple litigation. For example, common disaster cases, products liability cases, and patent litigation. In this field, if we consider the great industrial growth of the country and the economic growth of this country, as they are continuing, the problems of the judiciary will grow greater.

I know that your committee is well aware of the fact that just naming judges is not going to solve the problems which stem from the litigation explosion. The Judicial Conference of the United States is vitally concerned with these problems. Each of the members thereof and their committees, as well as each and every judge of the district courts and of the courts of appeals, are concerned with the problem of what we are going to do and how we are going to handle all of this litigation.

Each and every year the number of cases filed increases. With respect to complicated cases, the Federal courts have a larger number of them proportionately than any other courts. You could create more judgeships in an attempt to handle this massive litigation, but that would result in the necessity for dividing districts, and so forth, and I say to you that that is not the answer. We have to develop modern techniques, as are developed in business, to meet the challenge with which the courts are confronted. . . .

Now, if you consider the judicial manpower involved and the judicial hours that are required to deal with the discovery problems and all of the other various motions which must be disposed of before a case is reached for trial and you multiply that by the 30 districts, for example, in which a case is pending, the immensity of the problem is readily apparent. Involved litigation is not just a matter of an hour or two of preparation. It takes literally years to prepare a case and bring it to trial.

In the electrical equipment cases, if we had allowed each of the cases to go its own way, you could have had all of the officials

of the major electrical equipment manufacturers traveling a circuit throughout the country. They would have had to appear in 35 districts. That is what we are confronted with in this type of litigation, multiple litigation. . . .

The problem of multiple litigation is but a small part of the problems of the judiciary, but under this bill you will be giving the judiciary the tools with which to meet this one segment of our many problems.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 3815, A Proposal to Provide Pre-trial Consolidation of Multidistrict Litigation*, 89th Cong., 2nd sess., 1966, pt. 1, 5–7.]

Philip Price, Burden on Litigants of Transfer of Multidistrict Cases, Letter to Senator Hugh Scott, October 20, 1966

Some attorneys were uncomfortable with a broad grant of judicial power to a panel of judges not constituting a court. Philip Price, a longtime litigation attorney from Philadelphia who had handled large and complex cases, objected that the proposed standard governing when the JPML could consolidate and transfer pretrial proceedings—when the transfer would “promote the just and efficient conduct of such actions”—was so vague that it would be nearly impossible to mount a successful challenge to the panel’s decisions. Furthermore, Price argued that giving the panel the authority to intervene in situations where as few as two cases shared common facts would force litigants to bear the costs and burdens of a transfer in instances where little in the way of savings would be achieved.

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I write to register my strong disapproval of S. 3815 . . . . I, and others in my office who have had experience in multidistrict litigation, including the electrical equipment antitrust cases, are opposed to the adoption of §1407. . . .

There are two striking features about S. 3815, particularly when compared with other statutes affecting venue or regulating the judiciary. The first of these is the extraordinarily broad scope of the proposed section and the second is the unlimited power which it would vest, not in any court as heretofore constituted, but in a “judicial panel”.

By its terms the proposed §1407 would be applicable to as few as two actions involving one common question of fact. The panel, which is authorized to act on its own motion . . . may cause the transfer of actions if it finds that such transfers “will promote the just and efficient conduct of such actions”. These terms are so vague and general that they establish no objective standard and the words may be given whatever meaning justifies the judicial panel’s decision. With language of such breadth, it is unlikely that a reviewing court of appeals would substitute its judgment for that of a seven-member panel, especially when it is comprised in part of brother court of appeals judges, is appointed by The Chief Justice of The United States, and is given a Congressional mandate of such generality.

For the other authority proposed to be granted to the judicial panel, there are no standards whatsoever set forth in the bill either for the exercise or the manner of exercise of the power. Although the panel is authorized to remand an action to the district from which it was transferred before the conclusion of the pretrial proceedings, there is no guide to the circumstances in which or how such a remand should be made. Similarly, although the panel is authorized to separate any claim, cross-claim, counterclaim, or third-party claim and remand any such claims before the remainder of the action is remanded, there is no provision or reference to the circumstances in which or how such action should be taken.

The consequence of such a broad grant of power, applicable to [the] widest class of cases, with slight practical prospect of significant appellate review will be to vest in a very small part of the judiciary . . . complete control over the forum where, under modern practice, the bulk, and in some cases, all of the proceedings will take place. This is no trivial consequence. Without considering other factors affecting the parties’ choice of forum, the additional expense attributable to the multiple employment of counsel may far outweigh the savings resulting from any elimination of duplicate discovery in some cases for some parties. For the litigant, who has already employed a lawyer in District A, to have his case transferred to District B, means that he will have to employ another lawyer in District B or pay the increased fees and expenses attributable to transporting his District A lawyer to District B, or, more likely, to do both. If a litigant is in a second case

in District C which is transferred to District B, he will have three sets of lawyers instead of two.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 3815, A Proposal to Provide Pretrial Consolidation of Multidistrict Litigation*, 89th Cong., 2nd sess., 1966, pt. 1, 95–96.]

American Bar Association Section on Antitrust Law,  
Disapproval of Judicial Panel on Multidistrict Litigation,  
Testimony Before Senate Subcommittee on Improvements in  
Judicial Machinery of the Committee on the Judiciary, January  
24, 1967

The American Bar Association's Section on Antitrust Law submitted a report to the ABA's house of delegates recommending disapproval of the bill to create the JPML. William Simon, a former chair of the section and the chair of the group that prepared the report, submitted it as part of his testimony before Congress. In the report, the antitrust attorneys objected to the assignment of pretrial procedures and trial of a case to different judges located in different districts, and they found a provision in the proposed bill that would allow the panel to split up individual claims in complex suits particularly objectionable. The proper administration of justice, they argued, required that discovery for all claims be conducted in the context of the entire controversy and that the same judge handle both pretrial and trial proceedings. To do otherwise, the attorneys claimed, risked injustice to particular litigants whose cases might warrant individualized treatment.

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It is always in the interest of the administration of justice that, whenever possible, the same judge preside over the pretrial proceedings who is to preside at the trial of the case. Absent unusual circumstances all pretrial proceedings should be in the District in which the case is pending. It is generally a hardship to both the litigants and their counsel to participate in pretrial proceedings in the city at a great distance from the District in which their case is pending.

One asserted justification for consolidated pretrial is that this procedure “does not affect the actual trial of any case.” . . . This is a misconception. Pretrial, particularly in the cases contemplated

by the proposed bill, controls subsequent proceedings by defining the issues and the scope of permissible discovery. It follows that if a case is pretried in a distant forum by other parties in other cases under the procedures followed by a different court injustice may well result.

The problem is aggravated by the proposed bill under which portions of a case may be pretried in different districts. The bill (subparagraph (a)) states that the judicial panel “may separate any claim, cross-claim, counterclaim or third party claim and remand any such claims before the remainder of the action is remanded.” Pretrial proceedings and discovery should be conducted in the context of the entire controversy. Rule 13 of the Federal Rules of Civil Procedure specifically requires that all claims arising out of the same transaction or occurrence must be made part of the case at the pleading stage. The same considerations apply even more forcibly during the subsequent course of complex litigation. Rule 16 providing for broad discretion during pretrial is designed to further this objective.

Even if a case is not actually segmented for purposes of pretrial in another district, serious problems remain if a case is transferred under the proposed bill. Pretrial and discovery in the transferee district would undoubtedly be primarily concerned with the particular issues common to all cases. As a result, pretrial orders, which are customarily designed to set the framework for all issues to be tried, may not deal with some of the major problems in an individual case or may limit the issues so as to prejudice the rights of the parties.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 3815—89th Cong. and S. 159—90th Cong., A Proposal to Provide Pretrial Consolidation of Multidistrict Litigation*, 89th Cong., 2nd sess., and 90th Cong., 1st sess., January 24, 1967, pt. 2, 119.]





# Judicial Discipline and Removal

In 1930, Professor Burke Shartel of the University of Michigan Law School sparked a debate that would last for half a century when he suggested that impeachment should not be the sole method available for the removal of unfit federal judges. In a law review article, Shartel characterized impeachment both as too cumbersome and too narrow in the sense that the “high crimes and misdemeanors” standard for impeachment did not cover all possible situations in which the removal of a judge might be warranted. In fact, as of 1930, only eight federal judges had ever been impeached, and only three of those convicted by the Senate. As a result, Shartel concluded, “[t]he federal bench should be authorized to remove its own unfit members.”<sup>105</sup>

Shartel’s argument spurred Hatton Sumners, a Texas Democrat and the chair of the House Judiciary Committee, to propose a “trial of good behavior” to determine a judge’s right to remain in office following a complaint of misconduct. Sumners sponsored several bills between 1937 and 1941 that varied in their particulars, but each of them involved a resolution of the House of Representatives, directed to the Chief Justice of the United States, that a federal judge had failed to maintain good behavior, upon which the Chief Justice would appoint three judges from the circuit courts of appeals to conduct a trial on the issue. The first bill Sumners proposed made only district judges subject to removal in this manner and provided for no right of appeal. A later version, however, included judges of the courts of appeals (with the provision that such judges could not be tried by judges of their own circuit) and allowed a judge removed from office to appeal to the Supreme Court.

Despite gaining widespread support—including that of Attorney General Homer Cummings and the Conference of Senior Circuit Judges (now known as the Judicial Conference of the United States)—none of Sumners’s bills became law, primarily because of doubts regarding the constitutionality of removing a federal judge from office through

105. Burke Shartel, “Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution,” *Michigan Law Review* 28, no. 5 (March 1930): 485–529.

any method other than impeachment, as well as a fear that making the removal of a judge easier would infringe on judicial independence. In the 1950s, several members of Congress proposed limits on judicial tenure in response to decisions regarding desegregation and other civil rights issues, but none of these ideas was taken seriously by most legislators.

It was not until the 1960s that a vigorous debate over a nonimpeachment method of removing a federal judge from office reemerged. In 1962, attorney Joseph Borkin published *The Corrupt Judge*, a book detailing alleged financial impropriety in the 1930s and 1940s by Martin T. Manton of the Second Circuit, John W. Davis of the Third Circuit, and Albert W. Johnson of the Middle District of Pennsylvania, all judges who resigned rather than face impeachment.<sup>106</sup> A few years later, Judge Stephen Chandler of the Western District of Oklahoma sued the Judicial Council of the Tenth Circuit, alleging that by ordering him not to hear cases, it had effectively removed him from office in violation of the Constitution. The case served for many as an illustration of the need for legislation setting out a clear procedure for dealing with allegations of improper judicial behavior falling short of the standard for impeachment.

Joseph Tydings, a Democrat from Maryland and chair of the Senate Judiciary Committee's Subcommittee on Improvements in Judicial Machinery emerged as the leading advocate of a nonimpeachment method of judicial removal. Tydings introduced bills in 1968 and 1969 providing for the creation of a national commission to investigate complaints against federal judges and, if warranted, to recommend to the Judicial Conference of the United States that it remove a judge from office. As with Sumners's earlier proposals, the Tydings bills gained substantial support both inside and outside the federal judiciary, but lingering doubts about the legislation's constitutionality and its potential impact on judicial independence prevented these plans from coming to fruition. In the 1970s, Senator Samuel Nunn of Georgia attempted to pick up where Tydings left off, introducing several similar proposals for handling the removal of unfit federal judges entirely within the judicial branch. Once again, opponents of such a plan were successful in blocking it.

106. Joseph Borkin, *The Corrupt Judge: An Inquiry into Bribery and Other High Crimes and Misdemeanors in the Federal Courts* (New York: Clarkson N. Potter, 1962).

The fifty-year debate over the removal of federal judges effectively ended in 1980 with the passage of the Judicial Conduct and Disability Act.<sup>107</sup> The Act eschewed the creation of a centralized national body and instead gave the judicial councils of the circuits a greater role in investigating and resolving complaints against federal judges. Most notably, it lacked a provision for a nonimpeachment method for the removal of an Article III judge. In 1993, a congressionally created commission issued a report praising the Act for successfully balancing the competing notions of judicial independence and judicial accountability and recommending no major alterations to its structure.<sup>108</sup> In 2006, a study committee chaired by Justice Stephen Breyer conducted a detailed analysis of the judiciary's implementation of the Act and found it to have been very effective.<sup>109</sup> In the years since 1980, no major proposals to alter the Act have emerged, and no serious debate over the removal of federal judges by a method other than impeachment has taken place.<sup>110</sup>

Perhaps ironically, given that the debate over judicial removal was motivated in large part by the difficulty of impeachment, five of the fifteen federal judicial impeachments in American history occurred between 1986 and 2010. Four of those impeachments resulted in conviction and removal from office; in the fifth instance, the Senate dismissed the articles of impeachment after the judge in question resigned.

107. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Stat. 2035 (1980).

108. *Report of the National Commission on Judicial Discipline and Removal* (August 2, 1993).

109. Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* (September 2006). The committee reviewed a large sample of misconduct cases and found that the judicial councils and chief circuit judges had handled the "vast majority" of them appropriately under the Act, with an error rate of only 2 to 3 percent.

110. For background on the modern history of judicial impeachment, see Mary L. Volcansek, *Judicial Impeachment: None Called for Justice* (Urbana: University of Illinois Press, 1993). A discussion of the 1980 judicial conduct legislation can be found in Edward D. Re, "Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980," *Northern Kentucky Law Review* 8, no. 2 (1981): 221–258.

Senator Joseph D. Tydings, Need for an Alternative to Impeachment, Opening Statement to Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, February 15, 1966

In October 1965, Senator Joseph Tydings, a Democrat from Maryland, gave a speech on the Senate floor regarding problems that the Subcommittee on Improvements in Judicial Machinery, which he chaired, would be examining in the near future. Chief among the issues Tydings wished to address was the small handful of unfit federal judges who threatened to “spoil the public image of the Federal judiciary and impair public confidence in the administration of Federal law.” Remarking on the cumbersome nature of the impeachment process, Tydings proposed to study the feasibility of a method by which the judiciary could police itself by removing judges guilty of misconduct.<sup>111</sup> The following February, his subcommittee began hearings on this issue. In his opening statement, Senator Tydings focused on the inadequacy of the impeachment process, which he argued was unduly burdensome for the Senate and did not cover all potential situations in which the removal of a judge might be warranted.

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The purpose of these hearings is to determine whether the Federal judiciary has the necessary statutory tools to police its own house fairly and efficiently, and, if not, to explore the possibility of drafting and introducing remedial legislation. . . . We believe that, given the proper tools, the judiciary has the capacity to handle the problems created by the tiny handful of judges who, because of physical or mental disability, senility, alcoholism, laziness, or misfeasance, do immeasurable harm to the efficient administration of justice. . . .

Anyone even casually familiar with the Federal courts knows that the dockets are crowded and becoming more so as the amount of judicial business increases every year. The situation is already critical. In certain districts the average litigant may wait for more than 3 years after joinder of issue before coming to trial. This is

111. *Congressional Record*, 89th Cong., 1st sess., 1965, 111, pt. 20:27108.

not merely a matter of administrative concern, for justice delayed is justice denied. . . .

The workload in many of our Federal districts is such that the court is crippled if even a single judge does not carry his share of the burden. I think that everyone agrees that ideally such an unfit judge should be replaced without delay, but only after a careful, impartial evaluation of his fitness. Yet one thing that recent events have made crystal clear is that there is at present no fair and effective procedure for dealing with these cases when they arise. . . .

The purpose of today's hearing is to outline and explore the difficulties that are presently experienced in handling the infrequent instances of unfitness in the Federal judiciary. Historically the only method of actually removing a Federal judge from office, so that he is deprived of his title and his right to salary, has been impeachment by the House of Representatives and conviction on the impeachment charge by the Senate of the United States. This has created many difficulties, which our witnesses will explore with us in some detail today and at later sessions. First, constitutionally impeachment lies only for "treason, bribery, or other high crimes and misdemeanors." It is uncertain whether senility, insanity, physical disability, alcoholism, or laziness—all of which are forms of unfitness that require remedial action—are covered by the impeachment process.

The second difficulty lies in the nature of the impeachment machinery. . . . It is a cumbersome, archaic process . . . . If the Senate were required to do nothing but listen to testimony in an impeachment case for several weeks—the average time has been 17 days—the Legislative Calendar would be completely and absolutely disrupted. Obviously, few Senators would be able to spend so much of their time thus occupied, yet I submit that an impeachment trial before an empty Senate Chamber would be little more than a farce. History has shown that in some impeachment trials, as few as three Senators were present listening to the testimony, and one of the three was writing a letter. This would hardly comport with modern standards of justice. No conviction of a criminal defendant would be tolerated if it came after a trial at which most of the jurors were not present to hear the testimony and two of the three trial judges were absent during the testimony.

Impeachment is perhaps the sole method of removal of Federal judges that may be constitutionally employed by the Congress, for the principle of an independent judiciary, free from interference by the legislative or executive branches, is central to the concept of a government of separated powers. But this is not to say that impeachment is the only constitutionally permissible method of removing a Federal judge from office. It should be borne in mind that a judge is to serve “during good behavior,” while impeachment lies only for bribery, treason, “high crimes and misdemeanors.” It may be that the framers of the Constitution intended to permit other methods of removal not inconsistent with the principle of separation of powers. The scholarship on this question is disappointingly sparse, and I hope that one of the effects of our study will be to stimulate some scholarly reexamination of the arguments for and against the exclusivity of impeachment as a removal process from the Federal bench.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on Procedures for the Removal, Retirement, and Disciplining of Unfit Federal Judges*, 89th Cong., 2nd sess., 1966, pt. 1, 1–4.]

### Senator Joseph D. Tydings and Judge John Biggs, Jr., Need for a National Commission on Judicial Disability and Tenure, Exchange Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, April 23, 1968

In February of 1968, after two years of study by his subcommittee, Senator Tydings introduced the Judicial Reform Act, Title I of which provided for the creation of the Commission on Judicial Disabilities and Tenure. The commission was to consist of five active federal judges chosen by the Chief Justice of the United States and would have the power to investigate complaints against federal judges and to hold hearings to determine whether a judge's conduct had been inconsistent with the good behavior requirement of Article III of the Constitution. If the commission found a judge to have fallen short of the good behavior standard, it could recommend to the Judicial Conference of the United States that it order the judge's removal from office. A judge removed in this fashion would have the right to appeal to the Supreme Court.

Hearings on the bill began in April 1968. The first day of testimony featured an exchange between Tydings and Senior Judge John

Biggs of the U.S. Court of Appeals for the Third Circuit. Biggs expressed reservations about the creation of a national commission. A circuit judicial council, he asserted, was better equipped than a national body to perform the initial investigation of a judge in its own circuit. Biggs also shared his doubts regarding the constitutionality of removing a judge without resort to the impeachment process. He proposed instead the appointment of an additional judge to the court in question, while the judge under investigation would be prohibited from performing judicial service until the complaint was resolved by either exoneration or impeachment. Using the case of U.S. District Judge Stephen Chandler's battle with the judicial council of the Tenth Circuit (described more fully below) as an example, Tydings responded that a national commission would find it easier to be fair and impartial compared to "one's immediate brothers on the bench," who served in the same circuit and might have a personal bias for or against a particular judge. Tydings also felt strongly that allowing a judge under investigation to continue to receive a salary while doing no work would impair public confidence in the judiciary. Judge Biggs's proposal was very similar to the approach taken by the Judicial Conduct and Discipline Act of 1980.

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Judge BIGGS. . . . I have read the Commission provisions, the provisions which are set forth in S. 3055, very carefully, and have been over them and some of them have been explored by the Committee on Court Administration. It is my view that it would be more desirable and probably less difficult, to make use of the substance of the provisions of Senate 3055, not by way of a National Commission, but at the judicial council level, if the judicial councils were reconstituted by the addition of district judges to those bodies and a reduction in the number of judges of the council so that it might function more effectively.

I am also in very great doubt as to the provisions of S. 3055 in respect to the removal of the malfeasant judge from office, under the provisions of article III of the Constitution which provides, of course, that the judge shall hold office during his good behavior.

This presents very serious constitutional questions and I think that these could be resolved only by the Supreme Court of the United States. And I think that getting into that field may cause

very substantial acerbation of some of the situations which we have now.

I think it would be very much more desirable to provide simply that the judicial council of the circuit could investigate under the same powers that the Commission would be given, would make a report to the Judicial Conference of the United States, which in turn would report to the Executive, and to the legislation branch of the Government, and that those particular provisions which are now in the commission bill, S. 3055 in substance, should be applied at the judicial council level. . . .

What I think should be done would be to put [the malfeasant judge] in a position where the court could pass the work around him, and another judge, additional judge, could be appointed by the President, and then the courts would not be faced with this very serious constitutional issue, as to whether or not the good behavior clause will permit removal of a judge without impeachment.

Senator TYDINGS. . . . It seems that anything short of removal in an appropriate case would present quite a spectacle to the citizen: a judge found guilty by his peers on the bench, let us say, of receiving bribes, would be permitted merely to walk away from the bench; do no further judicial work, yet continue to receive his salary. Another judge would have to be appointed to fill the vacuum left by the errant judge—further increasing the taxpayers' burden. I do not think that would enhance the stature of the judiciary in this country. . . .

Judge BIGGS. . . . I do not think anyone can tell what the Supreme Court will do, but it seems to me it is a very strong possibility that the Supreme Court may take the position that impeachment is the only remedy. . . .

I would prefer to see all of this machinery, which is very ably and aptly set forth in S. 3055, instead of being put at the national level, put in the judicial councils. Retain your machinery, as it is, except that I would not view the business of removal from office, under article III, as a proposition that is more desirable, necessarily, than what would be effected by way of the present machinery of the judicial councils. . . .

Senator TYDINGS. What is your answer to the problem which has arisen in the 10th Circuit? The judicial council there attempt-



ed, without specific authority, but generally in the manner you propose, to remove a judge they felt was nonfeasant?

When we looked into the situation, as our subcommittee and the House subcommittee have, we found the most violent antagonisms, personal animosities, and being traded back and forth among the judges of the 10th Circuit and a constituent district of that circuit. The Chief Judge of the District Court for the Western District of Oklahoma has leveled serious charges against the judges at the 10th Circuit Council who found him “unable or unwilling” to carry out his duties. . . .

My point is this. All of that can be avoided by taking discipline out of the hands of one’s immediate brothers on the bench. Judges of the same circuit ought not to rule on the conduct of their fellows. A national commission like the one proposed in S. 3055 will avoid the unseemly spectacle of clashing judicial personalities engaged in charge and countercharge. In other words, you would not have anybody who was personally involved with a judge passing on his removal.

When I served as U.S. attorney for the district of Maryland, one of the judges of our district court was a very, very elderly man, who was really disabled, but he was held in utter veneration by the members of his court and by the members of the circuit bench, many of the judges of the circuit had once been his law clerks. One simply could not conceive of the Fourth Circuit asking this particular judge to step down.

While I would not conceive of the circuit council doing that, I would conceive of the chief judge or another judge, an attorney, or a citizen referring the problem to a national commission—one that included no judge from the Fourth Circuit. Such a commission could reach an objective decision on the facts.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 3055, S. 3060, S. 3061 and S. 3062, The Judicial Reform Act and Other Measures to Improve Judicial Administration in the Courts of the United States*, 90th Cong., 2nd sess., 1968, 34–39.]

Judge Clement F. Haynsworth, Jr., Support for a National Commission for the Removal of Unfit Judges, Testimony Before Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, June 2, 1969

In March 1969, Tydings, along with ten other senators of both parties, introduced a revised version of the Judicial Reform Act. The portion of the Act establishing a national commission remained essentially unchanged from that proposed in 1968. Although some federal judges, such as John Biggs, opposed major elements of the Tydings plan, that feeling was far from universal within the judiciary, as the testimony of Judge Clement Haynsworth of the U.S. Court of Appeals for the Fourth Circuit showed. Haynsworth agreed with Tydings that the impeachment process was inadequate and that the judicial branch should take responsibility for its own housekeeping. Moreover, he pointed out that having a national commission to review each and every complaint against a federal judge and dismiss those lacking merit would provide significant protection to the many judges who were victims of frivolous complaints from disgruntled litigants and others.

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I heartily endorse the proposal to create a Commission on Judicial Disabilities and Tenure as set forth in S. 1506. It is my firm conviction that judges should attend to any needed cleansing of the courthouses. Title I gives the judiciary the authority and responsibility to do it. I believe that it is anxious to have that authority and more than willing to shoulder the responsibility for the elimination of the unfit or disabled judge. Thank God and our system of appointments that the unfit judge and the disabled judge unwilling to take voluntary retirement are rarely encountered, but such phenomena do occur, and someone must be empowered to deal with them. . . .

It is my personal opinion that the impeachment power conferred upon the Congress by Article I is not exclusive, and that the Congress does have the power, if it wishes, to create such a commission with ultimate power of removal of a judge in the Judicial Conference of the United States, subject to permissive review by the Supreme Court.

I believe that the very existence of such authority and of the commission, which would initially handle complaints, would result in substantial protection to the fit judge who is the victim of misconceptions or frivolous complaints that may rankle widely in the absence of some readily available adjudicatory forum to assess them. I believe it would result in earlier retirements of those judges whose conduct is substantially questionable, and it would provide a much more orderly means for the involuntary removal of the rare unfit judge than the impeachment procedures now provide. I am heartily in favor of authorizing judges to remove from office the unfit judge whose willful misconduct reflects upon the entire system and the administration of justice, itself, so long as the judge in question has all of those rights to hearings and procedural due process which Title I of S. 1506 provide.

[Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 1506, S. 1507, S. 1508, S. 1509, S. 1510, S. 1511, S. 1512, S. 1513, S. 1514, S. 1515, and S. 1516, Bills Providing for Improvements in the Administration of the Courts of the United States and for Other Purposes*, 91st Cong., 1st sess., 1969, 135–136.]

Judge Stephen S. Chandler, Exclusive Authority of Congress to Supervise Judges, Reply Brief in *Chandler v. Judicial Council of the Tenth Circuit*, Supreme Court of the United States, October Term 1969

While Senator Tydings's proposal for judicial branch removal of unfit federal judges was pending before Congress, the case of Judge Stephen Chandler of the U.S. District Court for the Western District of Oklahoma raised questions about the degree of supervision the Constitution permitted federal judges to exercise over other federal judges.

In December 1965, the Judicial Council of the Tenth Circuit found Chandler, the chief judge of his district court, to be "presently unable, or unwilling, to discharge efficiently the duties of his office." Operating under its statutory power to make "all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," the judicial council ordered that Chandler be stripped of his pending cases and not assigned any new cases until further notice. The council later entered another order allowing Chandler to retain cases already assigned to him but continuing to bar him from new cases. Chandler asked the Supreme Court to

overturn the council's order, arguing in his brief that judges lacked the authority to police other judges and that the council's attempt to prevent him from hearing certain cases stripped him of his judicial power and was therefore an unconstitutional usurpation of the impeachment power.

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The Constitution imposes exclusively on the Congress the power and duty to police the judiciary. This is one of the cardinal checks and balances and is a power and duty which the Congress cannot constitutionally delegate to any other person or Governmental body. It naturally follows that the Congress cannot delegate this police power over the judiciary to *the judiciary itself* and specifically and especially cannot constitutionally delegate it to any judge or court of the judiciary. To do so would constitute abdicating its constitutional duty to exercise the power itself which duty is necessarily implied from the exclusive grant of power.

Every individual judge of the judiciary, no matter on what court he sits, is himself subject to the congressional power of impeachment. He, himself, has not the power, whether designated judicial or administrative, to inquire into the fitness of any other judge, because that power and duty to sit as a court and try the fitness of any and every member of the judiciary is, by the Constitution, exclusively and solely vested in the United States Senate, sitting as a *Court*. The Congress cannot constitutionally *permit* the judiciary to police itself nor can it side-step its own duty to do so.

By the same token the Congress cannot constitutionally permit any *part* of the judiciary to exercise police power over any other part, any court or body composed in whole or in part of judges, or any judge to exercise police power over any other court or judge.

Nor can any court, body of judges, or any judge legally, constitutionally or *ethically* seek, accept or exercise this exclusive congressional function.

To delegate the power or any part of it to any judge or court of the judiciary, whether designated a judicial or administrative agency, under guise of the power to supervise in any way, assist in "housekeeping" or "housecleaning" or inquire into the fitness of any member of the judiciary, would be equally unconstitutional.

al for the additional reason that such a delegation of power, even if reciprocal, would constitute class legislation, violative of the equal protection concept. . . .

No judge is properly a judge of the qualifications of his associates. He is exclusively a judge of legal controversies. His only police power over any judge is over himself. When his critical judicial eye looks other than inward it is off the ball and there is grave danger that he is neglecting his official duties. It is obvious that he is neglecting to police his own house where his most precious treasure is stored.

The framers of the Constitution knew that complete judicial independence was vital; that the kind of judges they envisioned *could* not and *would* not be supervised; that any sort of supervision would be evil; that it would destroy the very concept of independence; and that supervision would not be needed. They circumscribed it very, very carefully and effectively prohibited it by limiting it, in effect, to corruption in office. . . .

While it is true that the judiciary *should* police itself and keep its own house clean, this does not mean, as has been mistakenly supposed, that one judge or set of judges should police another judge or set of judges. The concept that the judiciary should keep its own house clean can only mean that *each* one of the 500 Federal Judges should keep his own house clean, *not* the house of his judicial brother. It means that he should tend to his own business with great care. If he does this well he will find it a full-time job. A judge's conscience is strictly a personal matter and cannot be tampered with (supervised) by another judge or set of judges. If he is a trial judge he should not be tampered with by judges of a court which reviews his decisions. He should be *especially* protected from interference in the performance of his duties by appellate judges.

[Document Source: U.S. Senate, Subcommittee on Separation of Powers of the Committee on the Judiciary, *Hearings on the Independence of Federal Judges*, 91st Cong., 2nd sess., 1970, 814–816, 821.]

Justice William O. Douglas, Independence of Judges from Each Other, Dissenting Opinion in *Chandler v. Judicial Council of the Tenth Circuit*, Supreme Court of the United States, June 1, 1970

The Supreme Court denied Chandler's request for relief, with the majority holding that it did not need to reach the question of whether the judicial council exceeded its authority because Chandler had failed to seek relief from the council itself, instead challenging the council's order immediately in the Supreme Court. While the case resulted in no significant legal precedent, a dissent filed by Justice William O. Douglas—who believed the case was ripe for a decision on the merits—was memorable for its vigorous opposition to permitting judges to discipline other judges. Douglas explained why he believed the council's action in disqualifying Chandler from certain cases was tantamount to impeachment and therefore an unconstitutional infringement on judicial independence. The concept of an independent judiciary, Douglas stressed, meant much more than independence from the other branches of government and included the independence of every judge from every other judge.

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An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Under the Constitution the only leverage that can be asserted against him is impeachment, where pursuant to a resolution passed by the House, he is tried by the Senate, sitting as a jury. . . .

What the Judicial Council did when it ordered petitioner to "take no action whatsoever in any case or proceeding now or hereafter pending" in his court was to do what only the Court of Impeachment can do. If the business of the federal courts needs administrative oversight, the flow of cases can be regulated. Some judges work more slowly than others; some cases may take months while others take hours or days. Matters of this kind may be regulated by the assignment procedure. But there is no power under our Constitution for one group of federal judges to censor or discipline any

federal judge and no power to declare him inefficient and strip him of his power to act as a judge. . . .

The problem is not resolved by saying that only judicial administrative matters are involved. The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good. That is the crucial issue at the heart of the present controversy. . . .

It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of "hazing" having no place under the Constitution. Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress. But I search the Constitution in vain for any power of surveillance that other federal judges have over those aberrations.

[Document Source: *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 136–137, 140 (1970).]

Judge Frank J. Battisti, Opposition to Vesting Judiciary with Power to Remove Judges, Address at Boston College Law School, November 18, 1971

Judge Frank Battisti of the U.S. District Court for the Northern District of Ohio also opposed any legislation that would give the judicial branch the power to remove a federal judge from office. Like Justice Douglas, Battisti considered such an arrangement to be destructive

of judicial independence. One of his primary concerns was that the existence of a national commission to receive complaints against judges would encourage litigants displeased with a judge's ruling to harass the judge by calling for an official investigation into his or her conduct. Battisti also pointed to the *Chandler* case as evidence of the dangers inherent in permitting federal judges to exercise supervisory power over their fellow judges. Like many of his peers, Battisti believed that impeachment was the sole remedy for the problem of the unfit federal judge.

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The founding fathers were convinced that the independence of the judiciary was of paramount importance in their new government. Their belief was embodied in the Third Article of the Constitution, which provides that judges “shall hold their office during good behavior.” The framers of the Constitution sought to establish the judiciary's independence by limiting the method for removal of federal judges to a cumbersome impeachment process. . . .

The proposed Act attempts to circumvent the impeachment provisions of the Constitution. Its supporters correctly contend that the impeachment process is cumbersome; indeed, they argue that it is too cumbersome. In their haste to condemn it, however, they demonstrate its essential purpose. Impeachment was *designed* to be cumbersome in order to make removal by whim an impossibility. It embodies the belief that before a judge can be removed from office he must have offended the Constitution to such a degree that the great weight of the Congress is moved to convict him. . . .

It seems to me that supporters of S. 1506, such as Mr. Bor-kin, do not really want to see the federal judiciary improved; they want to see heads roll. It should not matter how a “judge of questionable character” leaves the bench so long as he does. The institution of the federal judiciary is better served by the resignation of a particular judge than by the successful witch-hunting of a few individuals bent on removing all those jurists who, in the opinion of a few, are not observing the requirements of good behavior. . . .

I cannot count the number of times nor recount the variety of claims upon which attorneys have brought suit against powerful public agencies in my courtroom. If the Commission were in



existence and any disgruntled litigant could bring a judge before it, how, then, could a judge decide a case which requires the determination of a controversial social issue. Unquestionably, he would be reluctant to find against a contentious litigant if he knew that the loser could bring him before the Commission. Under the present system, the dissatisfied litigant returns to his office and prepares an appeal. If the Commission were in existence he might also call an investigative agency to request an inquiry into the judge's character and his activities on and off the bench. With the possibility of abuse so great, it is unlikely that the presence of the Commission would lead to the fair hearing of cases; rather, it would likely give dissatisfied litigants license to discredit federal judges. . . .

The time has come once and for all to end the harassment of federal judges. Every few years another attempt is made to impinge upon the independence of our unique judicial system. This time, however, there is some new evidence of the probable ill effects of such an impingement. Somewhat rhetorically I must ask how many more Judge Chandlers there must be before Congress recognizes that these legislative creations unconstitutionally encroach on the independence of the federal judiciary. Some members of Congress who support this kind of legislation seem intent upon creating some new tribunal for the removal of federal judges. But in assuming this position they ignore a tribunal which already exists—the Senate sitting as a court of impeachment. As I have noted, the arguments against sole reliance upon this Court are weak and unpersuasive.

The time has also come for all the interested parties, both judicial and congressional, to remember the limitations inherent in their offices. The Judicial Conference was created to aid in the efficient administration of the courts and not to sit as a reviewing body over the issue of the alleged misbehavior of federal judges. Similarly, the Supreme Court should be the ultimate arbiter of lawsuits, not the final authority in determining whether an inferior judge or one of its own members is unfit to sit.

I am a Chief Judge of the United States District Court. I attempt to administer within my own district, and I attempt to see that the judges in my district operate as efficiently as they can. It is not my role, however, to demand that any one judge not have a case on

his docket for more than a specific length of time, or that he act more cordially towards litigants. We are judges, not policemen. If we fail in our duties, have us impeached. The Congress should neither foster nor condone conflicts within the judiciary; conflicts will inevitably arise through creation of any judicial commissions such as that proposed in S. 1506. As Senator Sam Ervin has noted on numerous occasions: "To me, the duty of a federal judge is to decide cases and controversies—not to meddle in the business of his colleagues." I agree.

[Document Source: Frank J. Battisti, "The Independence of the Federal Judiciary," *Boston College Law Review* 13, no. 3 (February 1972): 422, 428–429, 431, 455–456.]

Senator Sam Nunn, Public Confidence in the Judiciary, U.S. Senate, Speech of April 29, 1977

None of Senator Joseph Tydings's proposals for a nonimpeachment method for the removal of unfit federal judges came to fruition, and Tydings was defeated when he ran for reelection in 1970. Soon after, the banner of reform was taken up by Senator Sam Nunn, a Democrat from Georgia, who introduced several bills on the subject between 1974 and 1979. Nunn's proposals involved the creation of a twelve-member council on judicial tenure to perform an initial screening of all complaints against federal judges. Those complaints not dismissed immediately would be referred to the judicial council of the circuit in which the accused judge served, and the judicial council would be responsible for conducting an investigation and issuing a report to the council on judicial tenure. If the council on judicial tenure elected not to dismiss the complaint after receiving the report, it would then refer the matter to a court on judicial discipline, composed of all of the members of the Judicial Conference of the United States except the Chief Justice. After conducting a trial, the court would have the authority to impose a penalty up to and including removal of the judge from office, although such an order would be stayed pending an appeal to the Supreme Court. As was the case with Senator Tydings's plans, removal of a judge under the Nunn proposals would be accomplished entirely within the judicial branch.

In introducing his third bill on judicial tenure in 1977, Nunn focused his remarks on the need to maintain public confidence in the federal judiciary in the post-Watergate era, when skepticism and distrust of the government were at an all-time high. Nunn, like Sumners and Tydings before him, considered the impeachment pro-

cess to be wholly inadequate for ensuring that federal judges live up to the “good behavior” standard of Article III and thereby retain the public’s trust.

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Many lessons should be learned from the recent experiences of the Watergate era. We were reminded that power can intoxicate its holders, and be abused by the highest governmental officials in this Nation. We all must recognize the unfortunate fact that public confidence in Government has been eroded over the past few years for many reasons, and it will continue to decline unless affirmative steps are taken, in each branch of Government, to stimulate renewed trust in public officials and institutions.

The daily news reports are replete with accounts of the new disclosure requirements being imposed on prospective Presidential appointees and of the drafting of more extensive ethical standards for Members of Congress. It is imperative that all governmental officials act to restore and maintain the public trust. I believe very strongly that in no branch of Government is this public confidence and respect more vital than in the Federal judiciary.

It would be exceedingly shortsighted to focus current reform efforts on ensuring that members of the executive and legislative branches of our Federal Government conform to legal, moral, and ethical standards of the highest order and, at the same time, to ignore the conduct and capabilities of members of the branch of Government which possesses the authority to interpret, delay, and discontinue the actions of the other two. . . .

I believe that a thorough analysis of the impeachment procedure leads one to the inevitable conclusion that, in practical as well as legal terms, impeachment has not insured and cannot effectively insure judicial compliance with the constitutional “good behavior” standard. . . .

The fact that repeated efforts have been made by scholars, jurists and legislators to develop a reasonable alternative to impeachment can be viewed as substantial evidence, in and of itself, [that] a need for improved judicial accountability has existed throughout our history. . . .

The logical and unavoidable conclusion at this point is that congressional inaction on the subject of judicial tenure and discipline has resulted in one of the three branches of our Federal Government being virtually unaccountable to anyone, even itself.

[Document Source: Congressional Record, 95th Cong., 1st sess., 1977, 123, pt. 11:12965–12966.]

Judge J. Clifford Wallace, Opposition to the Nunn Bill,  
*Judicature*, May 1978

Judge J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit opposed the Nunn bill, arguing that the problem of the unfit federal judge involved too few instances to justify the creation of a complex new system that, in Wallace's opinion, was probably unconstitutional. Judge Wallace favored giving the judicial councils of the various circuits greater power to review and handle complaints against judges. In the rare instances in which a judge's conduct might warrant impeachment, Wallace suggested that the circuit council send the case to the Judicial Conference, which would then have the option of recommending to the House of Representatives that it begin impeachment proceedings. Wallace's approach was, in essence, ultimately enacted into law in the form of the Judicial Conduct and Disability Act of 1980.

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I have arrived at the conclusion that S. 1423 (the Nunn bill) is a particularly objectionable proposal. My disagreement with it is both specific and general. That is, I believe the specific provisions of the measure are ill-advised; it is a bad bill. More broadly, I quarrel with both the bill's constitutional and political premises; it is, in my view, both unconstitutional and unwise. . . .

Keeping in mind that there are only about 500 full-time Article III judges, it is absurd to create a complex new machine of very questionable constitutionality to deal with the extraordinarily few who deserve disciplinary attention. It is a manifestly more prudent course to take a cautiously circumscribed and much more likely constitutional step which nevertheless is adequate to deal effectively with any judicial misconduct requiring official attention, though not necessarily warranting impeachment. . . .

Before passing from the policy considerations of S. 1423, I reiterate my belief that there are very few federal judges whose conduct has truly been so outrageous as to justify removal. Although even one such judge is unfortunate, does this problem merit the creation of a full-fledged bureaucracy consisting of a new governmental commission, a new Article III court and additional duties for the critically backlogged panels of the courts of appeals? In my estimation, the Nunn bill represents the proverbial use of a sledge hammer to eradicate the irritating gnat. . . .

The great majority of judicial “disciplinary” problems are now being fully resolved through the efforts of the chief judge of the appropriate circuit. There are, however, cases in which the conduct is too grave or habitual to be resolved by the encouragement and exhortation of the chief judge. These cases, which I reiterate are very few, should be dealt with initially by the judicial council of the appropriate circuit (called the circuit council). 28 U.S.C. §332(d) empowers the circuit council to “make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.” Although the reaches of this power have not been finally determined, it appears that the circuit council can take strong action vis-à-vis a judge whose conduct adversely affects the administration of justice.

In order to enhance the ability of the circuit council to deal with these kinds of problems, I propose an amendment to section 332 . . . .

[T]he council should be given the opportunity, in the first instance, to review all complaints concerning the conduct of a judge within that circuit. Thus, complaints received by the Administrative Office of the United States Courts, members of Congress and others should be referred immediately to the appropriate circuit council. This council, acting pursuant to its power to make all orders necessary for the expeditious administration of justice, would be able effectively to resolve the great majority of questions of judicial conduct coming before it.

In addition, there may be rare cases where the alleged conduct represents corruption or other misdeeds which are so grave as to justify removal from the bench. In these few cases, the circuit council should transmit a report of the matter to the Judicial Conference of the United States. If, after reviewing the matter, the

judicial conference is of the opinion that the problem cannot be resolved by the circuit council and that the conduct is sufficiently grave, the judicial conference should transmit its report to the House of Representatives for initiation of the appropriate constitutional procedure, impeachment.

[Document Source: J. Clifford Wallace, "The Nunn Bill: An Unneeded Compromise of Judicial Independence," *Judicature* 61, no. 10 (May 1978): 476, 479–481.]

Judge J. Edward Lumbard, Support for the Nunn Bill,  
*Judicature*, May 1978

Senior Judge J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit contributed his own editorial as a counterpoint to that of Judge Wallace. Judge Lumbard believed that a national commission was necessary because the judicial councils of the circuits had not done enough to ensure that federal judges were held accountable if they failed to comply with the good behavior standard of Article III. The councils, Lumbard felt, were often hindered by the fear of "local embarrassments" in disciplining judges within their circuits, a problem that would be eliminated by the creation of a national commission. Lumbard denied that such a measure would infringe on judicial independence, arguing that it would have no effect on the performance of judicial functions related to the merits of a case.

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Although circuit councils of each circuit, composed of the active circuit judges of the circuit, have the power by statute to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," they have made few attempts to take disciplinary measures. In addition, such attempts as have been made have been challenged, and it is not yet clear that the power given the councils includes the power to curtail in any general way what particular judges may do in the way of conduct. . . . A serious handicap to the councils is the fact that they lack the subpoena power and cannot compel the attendance and testimony of witnesses or the production of papers.

But even where the facts are clear enough, circuit councils have often been curiously reluctant to act. . . .

The reluctance of the circuit councils to act with respect to abuses in their circuit and the readiness of the Judicial Conference

to do so point up the advantage of placing investigative and disciplinary powers in a judicial body with nationwide powers, unhampered by the possibility of local embarrassments which prevent action.

Those who oppose any grant of power to discipline judges rely largely on the argument that the exercise of such powers would infringe the independence of the judges, and might be used to punish judges who express views at odds with the majority. Of course, independence to decide cases and make judicial rulings is one thing; independence to behave any way the judge pleases, without consideration for what is proper, is another.

The constitutional provision of Article III that judges "shall hold office during good behaviour" should be given its natural and intended meaning. Judges are assured of their office only so long as their conduct conforms to what the bar and the public may reasonably expect. If a judge is notoriously intemperate, neglects his duties or acts so as to bring the court into disrepute, his conduct is no longer good behavior. . . .

Senator Nunn's bill, S. 1423, would create a Commission on Judicial Conduct and Disability with powers to investigate, hold hearings and recommend further proceedings. . . .

If a formal hearing were found necessary, the complaint would be referred to a new Court on Judicial Conduct and Disability. . . .

The mere existence of such a commission and court with full power to inquire and to act would accomplish two purposes: It would provide the means for conclusively and speedily disposing of the numerous groundless, yet annoying complaints which are made but which are not now resolved; and judges would know that they could not disregard standards of good behavior or even the rulings of the Judicial Conference as some have done. . . .

None of the powers proposed for the commission or court, or the actions to be taken by those bodies, would interfere in any way with the independence of any judge to perform any duty which is a judicial duty and has to do with the merits of any factual or legal question pending before him. It is noteworthy that the Nunn bill has been endorsed, in total or in principle, by the Judicial Conference, the American Bar Association, the American Judicature Society and the American Association of Attorneys General.

No matter how careful the President and Senate may be in the appointment of Article III judges, there will always be some

whose conduct will raise serious questions, some who may become incompetent or unable to serve, usually through no fault of their own. The business of the federal courts is too important to the public to permit it to be administered by judges whose capacity, competence or integrity is open to serious question. The public interest is paramount; it should receive protection against maladministration by judges comparable to that which is provided against misfeasance in the executive and legislative branches.

A President must account to the electorate every four years, and the members of Congress every two or six years. In our scheme of government it is simply unacceptable to argue that the conduct of judges may not be questioned by their peers, or by any means short of impeachment, when they fall short of a good behavior which the Constitution requires in return for life tenure.

[Document Source: J. Edward Lumbard, "The Nunn Bill: A Way to Ensure Judicial Accountability," *Judicature* 61, no. 10 (May 1978): 482–484.]

Judge Irving R. Kaufman, Threat to Judicial Independence of a Commission on Judicial Conduct, Benjamin Cardozo Lecture to the Association of the Bar of the City of New York, November 1, 1978

Judge Irving Kaufman of the U.S. Court of Appeals for the Second Circuit—who was perhaps best known as the judge who presided over the 1951 trial of accused Soviet spies Julius and Ethel Rosenberg—strongly opposed the Nunn bill, believing it to be a serious threat to judicial independence. Kaufman feared that any judge who ventured outside the mainstream would potentially be subject to removal by the new machinery the bill would put in place. In his view, maintaining absolute judicial independence, and warding off any attempts to encroach upon it, was worth the price of tolerating some degree of misbehavior by federal judges.

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Proposals like the Senate bill are fatally misguided and pose an ominous threat to the judicial independence so necessary to our form of government. . . .

We must tolerate some judges without whom the system would be better off, because the dangers are greater on the side of an overly potent removal power. The possibility of judicial removal



for vague grounds of dissatisfaction would create a dragnet that would inevitably sweep into its grasp the maverick, the dissenter, the innovator, the reformer—in a word, the unpopular. Even apparently innocent attempts to rid the bench of its disabled members—those suffering from senility, drunkenness, mental instability, or other unfortunate “status” defects—may mask something more sinister. A provision allowing removal on grounds of disability, wrote Hamilton, “would be more liable to abuse than calculated to answer any good purpose.” Half a century later, Justice Story added:

An attempt to fix the boundary between the region of ability and inability would much oftener give rise to personal, or party attachments and hostilities, than advance the interests of justice, or the public good. And instances of absolute imbecility would be too rare to justify the introduction of so dangerous a provision. . . .

Judicial independence, like free expression, is most crucial and most vulnerable in periods of intolerance, when the only hope of protection lies in clear rules setting forth the bright lines that cannot be traversed. The press and the judiciary are two very different institutions, but they share one significant characteristic: both contribute to our democracy not because they are responsible to any branch of government, but precisely because, except in the most extreme cases, they are not politically accountable at all and so are able to check the irresponsibility of those in power. Even in the most robust of health, the judiciary lives vulnerably. It must have “breathing space.” We must shelter it against the dangers of a fatal chill.

[Document Source: Irving R. Kaufman, “Chilling Judicial Independence,” *Yale Law Journal* 88, no. 4 (March 1979): 682–683, 703–704, 715.]

Raoul Berger, Appropriateness of Judicial Removal Power Within Judicial Branch, *Cornell Law Review*, June 1979

Judge Kaufman’s 1978 speech (excerpted above) was devoted in large part to criticism of arguments advanced by scholar Raoul Berger in favor of a nonimpeachment method of judicial removal. Much of the disagreement between Kaufman and Berger—an expert on the

Constitution who had taught law at both Berkeley and Harvard—centered on the constitutionality of an alternate removal procedure with a specific focus on how English law might have informed the framers' view of the subject. Kaufman and Berger also clashed on the question of whether the creation within the judicial branch of an apparatus capable of removing judges from office would destroy judicial independence. In a 1979 article directed at Judge Kaufman, Berger argued that any suggestion that judges were incapable of judging their peers in a fair and impartial manner would call into question the very legitimacy of the federal judiciary.

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Why does Judge Kaufman, who chants the praises of “collegiality,” of “collective decisionmaking” on appeal, and of the “tightly knit” “judicial fraternity”—a fraternity which can repeatedly rule against a dissenter below without stifling dissent—suspect that Dr. Jekyll would become Mr. Hyde when sitting as a court drawn from the entire nation, a sinister dragnet for dissenters? The implication that the summoned judge will suspect that such a court would remove him for deciding for (or against) desegregation is unworthy both of the judge and of the court which would sit on the removal hearing. To object to the trial of a judge, for misconduct, by his judicial peers drawn from the entire United States is to cast doubt on the fairness of the judicial process. If such a panel cannot be trusted to fairly try a “dissenter” for alleged judicial misconduct, no more can a district judge be trusted to try social rebels. If the process is good enough for the common man in matters of life or death, it is good enough for the trial of a judge's fitness to try others. . . .

Judge Kaufman recognizes that “[i]f impeachment is designed for occasional use only, there must be some other means of ensuring that judges do not abuse their trust.” But he dismisses removal of judges for criminal offenses because of the availability of indictment, *e.g.*, Judges Kerner and Manton were indicted and convicted. On the other hand, the noisome practices of District Judge Albert W. Johnson of Pennsylvania extended over a twenty-year period; complaints about his conduct began almost immediately; he was under continuous investigation; a judge of his own Circuit Court went to Washington to obtain relief. At last he was in-

dicted but acquitted, though his co-conspirator son, the object of his corrupt favors, was convicted. Two of the witnesses who had themselves been convicted refused to repeat the testimony they had given before the grand jury. Who has not witnessed jury acquittals that leave a large area of doubt as to the innocence of the defendant? What too of the cases which just fall short of "beyond a reasonable doubt" but nevertheless besmirch the court? Then there are the cases altogether devoid of criminality but yet discredit the judicial process. . . .

A last word about the alleged threat removal by judges poses to judicial independence: where Judge Kaufman regards it as an irrefutable postulate, practical experience has shown that such removal proceedings have little or no impact on judicial independence. Thirty-five to forty states have such removal procedures, and there is no evidence that the administration of justice has thereby been impaired. To the contrary, a pioneer state, California, considers that such procedures "can [raise] the caliber of the judiciary, while concomitantly increasing the confidence of the public in the whole judicial structure." A past president of the American Bar Association, Robert W. Meserve, who studied the state practice, reminds us of Justice Brandeis' words that the states are the laboratories of experimentation, and that "with substantial unanimity" they have reached the conclusion that this is "a desirable way to approach the rare problem of the judge who needs to be removed or retired. . . ." That practice rebuts Judge Kaufman's assumption that "all conceptions of judicial hierarchy would be toppled if the tenure of any judge could be ended by any other judge issuing a writ," a distorted version of the country-wide panel of judges proposed by the bill he assaults. No reports of "toppling" state hierarchies have come from the forty states. Since the "delicate balance of collegiality and individualism" is no more "necessary to the work of the federal bench" than to that of the states, "absolute" independence is patently not a *sine qua non* of impartial adjudication.

It remains to emphasize that the proposed judicial removal procedure is not designed to curtail independence, "absolute" or not, for it is not intended to deal with the judicial takeover of large-

scale policymaking, but rather with judicial misconduct, criminal or otherwise, when it affects the functioning of the courts.

[Document Source: Raoul Berger, “‘Chilling Judicial Independence’: A Scarecrow,” *Cornell Law Review* 64, no. 5 (June 1979): 823, 825, 853–854.]

### National Commission on Judicial Discipline and Removal, Effectiveness of Judicial Conduct and Discipline Act of 1980, Report of August 2, 1993

The legislative efforts to create a new system of judicial discipline and removal that began in the 1930s culminated in the Judicial Conduct and Discipline Act of 1980, introduced by Democratic senators Edward Kennedy of Massachusetts and Dennis DeConcini of Arizona. Those who had advocated that the judicial branch be given the power to remove unfit federal judges without resort to the impeachment process were disappointed, as the Act contained no such provision. Nor did the new law create a national commission as the previous proposals by Hatton Sumners, Joseph Tydings, and Samuel Nunn would have done. Instead, the Act provided that a complaint against a judge would be sent first to the chief judge of the circuit, who could dismiss the complaint for frivolity or other specific reasons or, if finding immediate dismissal not to be warranted, appoint a committee made up of district and circuit judges from the circuit to conduct further investigation and issue a written report to the judicial council of the circuit. Upon receiving the report, the judicial council could take a number of different actions, including, but not limited to, certifying the judge complained of as disabled, requesting that the judge retire voluntarily, and censuring the judge either privately or publicly. The judicial council also had the option of referring the complaint to the Judicial Conference of the United States, and in doing so, could express the view that the judge's conduct might warrant impeachment. If the Judicial Conference agreed or made its own such determination, it would transmit the complaint to the House of Representatives along with a recommendation that impeachment proceedings be instituted.

In 1990, Congress created the National Commission on Judicial Discipline and Removal to investigate issues related to the tenure of Article III federal judges and “to evaluate the advisability of proposing alternatives to current arrangements with respect to such problems and issues, including alternatives for discipline or removal of judges that would require amendment to the Constitution.” The commission, chaired by U.S. Representative Robert Kastenmeier

and including federal judges, state judges, attorneys, law professors, members of Congress, and others, was to dissolve upon issuing its final report to the president, Congress, and the Chief Justice. The commission's report, issued in 1993, was favorable in its evaluation of the 1980 Act, concluding that it was unlikely that an alternate system of discipline would balance judicial accountability and judicial independence as well.

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The system of formal and informal approaches to problems of misconduct and disability within the federal judicial branch is working reasonably well. It is by no means a perfect system, and the Commission identified numerous areas where it believes improvements could and should be made. It is, however, a system that both in design and execution strives to accommodate core constitutional values—judicial independence and judicial accountability—that are in tension. Any alternative system proposed for the federal judiciary should be evaluated according to its potential to strike that balance. The Commission is not aware of any that would do it as well.

The 1980 Act, which is the principal formal mechanism within the judicial branch, has yielded substantial benefits both in those few instances where it was necessary for the judicial councils to take action and, more importantly, in the many instances where the existence of its formal process enabled chief judges to resolve complaints through corrective action and, indeed, to resolve problems before a complaint was filed. These benefits have entailed costs, to be sure, but in the Commission's view those costs have been acceptable.

The main concern of the federal judiciary during the legislative process that led to the 1980 Act was the impact of any supplement to the impeachment process on judicial independence. The Commission has found no substantial evidence that the 1980 Act has threatened or impaired judicial independence. Nor has the implementation of the 1980 Act imposed burdens on federal judges or court staffs so great as to call for fundamental revision. . . .

[The Commission's] recommendations also reflect the conviction that perhaps the greatest benefit of the 1980 Act has been the support it has provided, and the impetus it has given, to informal

approaches to problems of federal judicial misconduct and disability. No evaluation of the 1980 Act should neglect its influence in this regard nor the likely relationship between the continuing importance of informal mechanisms in a decentralized system of self-regulation and the general perception that federal judicial independence is alive and well.

Indeed, these considerations convinced the Commission that an alternative scheme of discipline for federal judges modeled on one of the systems in place in the states is neither necessary nor desirable. Apart from the fact that the existing federal system is working reasonably well and is capable of improvement, the reliance on a central enforcement authority that is characteristic of state systems might entail unacceptable costs to judicial independence, as it surely would to effective informal approaches to misconduct and disability.

[Document Source: *Report of the National Commission on Judicial Discipline and Removal*, August 2, 1993, 123–24.]

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# Index

- Administrative Office of the U.S. Courts, 31–32
- Ainsworth, Robert A., Jr., 79
- alternative dispute resolution, 5, 215–216, 237, 251–261
- Alternative Dispute Resolution Act of 1998, 252
- American Bar Association
  - and diversity jurisdiction, 229, 231–232
  - and judicial discipline, 321
  - and public defenders, 116, 129
  - and speedy trial, 160, 171
  - Section on Antitrust Law, 296
  - Special Committee on Coordination of Judicial Improvements, 96
- American Law Institute, 217–219, 221–222
- Antiterrorism and Effective Death Penalty Act of 1996, 115, 178
- Association of the Bar of the City of New York, Committee on Federal Courts, 254
- bail, 3–4, 113–114, 135, 137–159, 172–175
- Bail Reform Act of 1966, 137–148, 153, 159
- Bail Reform Act of 1984, 114, 136–137, 172–175
- Bankruptcy Amendments and Federal Judgeship Act of 1984, 9, 33
- bankruptcy, proposed executive branch agency for, 31–32, 34–41
- Bankruptcy Reform Act of 1978, 8, 32, 48
- Bator, Paul M., 178
- Battisti, Frank J., 313
- Bazelon, David L., 204
- Begam, Robert G., 229
- Bell, Griffin B., 48, 65, 73, 172, 224, 254
- Berger, Raoul, 323
- Bickel, Alexander M., 86
- Biggs, John, 63, 304
- Block-Lieb, Susan, 52
- Borkin, Joseph, 300
- Bowman, Charles H., 140
- Brookings Institution, 30–31, 34–35, 37
- Brown, John R., 61–62
- Brown v. Allen*, 176–177, 191–192
- Burdick, Quentin, 43
- Burger, Warren, 32, 52, 58, 84, 172, 187, 213, 251–252
- Byrd, Robert C., 147
- Byset, J. Fred, 278
- Cahill, William, 19
- caseloads
  - antitrust, 291
  - diversity jurisdiction, 223
  - Fifth Circuit, 61, 73
  - habeas corpus, 177
  - Ninth Circuit, 60
  - private civil, 218
  - Supreme Court, 79–80
  - U.S. courts of appeals, 57
- case management and settlement, 5, 215, 236–250
- Celler, Emanuel, 119, 183, 288
- Chandler, Stephen S., 300, 305, 307, 309
- Chandler v. Judicial Council of the Tenth Circuit*, 309–313
- Christensen, A. Sherman, 130
- Churgin, Michael J., 202
- circuit executives, 7
- Civil Justice Reform Act of 1990, 7
- civil rights, 4, 58, 61–62, 65, 74–79, 113
- Clark, Charles, 62
- Class Action Fairness Act of 2005, 214, 264, 283–287
- class actions, 2, 4, 214, 262–287
- Clemon, U. W., 74
- Coleman, James P., 62
- Commission on the Bankruptcy Laws of the United States, 30–32, 35, 37, 47
- Commission on the Revision of the Federal Court Appellate System (Hruska Commission), 67, 69, 90, 94, 99–100, 102, 109–110
- Committee on Poverty and the Administration of the Federal Criminal Justice System (Allen Committee), 124, 137–138

- complex litigation, 2, 287–297
- Conway, Jack T., 144
- Coordinating Committee on Multiple Litigation in the District Courts (Murray Committee), 288, 292
- Copenhaver, John T., 45
- crime rates, 2, 146–149, 151, 157–158, 160, 196
- Criminal Justice Act of 1964, 10, 113, 117, 124, 130–133, 158
- Curtis, Dennis E., 202
- Cyr, Conrad K., 35, 40
- D.C. Court Reform and Criminal Procedure Act of 1970, 146
- Dimock, E. J., 121, 124
- diversity jurisdiction, *see* jurisdiction
- Doub, George Cochran, 17
- Douglas, William O., 86, 312
- Drake, Homer, 43
- Dunner, Donald R., 109
- Eastland, James O., 62, 69, 73, 76
- Eighth Amendment, 147
- Eisele, G. Thomas, 260
- Eisen v. Carlisle & Jacquelin*, 266, 271
- Erie Railroad v. Tompkins*, 217, 219
- Ervin, Sam J., Jr., 126, 138, 146, 161, 165, 167, 171, 316
- Fay v. Noia*, 176
- Federal Courts Improvement Act of 1982, 59
- Federal Courts Study Committee, 233, 258
- federal judges, discipline and removal of, 5, 299–328
- Federal Judicial Center, 7, 50, 82, 238, 260, 287
- Federal Magistrates Act of 1968, 7–8, 10–11
- Federal Magistrates Act of 1979, 8, 12
- Fifth Amendment, 151–153
- Fiss, Owen M., 245
- Fleeharty, M. Kendall, 278
- Frankel, Marvin E., 196–197
- Freed, Daniel J., 169
- Friendly, Henry J., 180, 225
- Gee, Thomas G., 71
- Gideon v. Wainwright*, 117, 135
- Godbold, John C., 67
- Goldstein, Abraham S., 150
- Goodlatte, Bob, 283
- Greenwood v. U.S.*, 152
- Griswold, Erwin N., 105
- habeas corpus, 2, 4, 115, 175–195
- Halleck, Charles W., 154, 157
- Halpern, Charles R., 22
- Handler, Milton 265
- Haworth, Charles R., 103
- Haynsworth, Clement F., Jr., 308
- Hruska, Roman L., 67, 139, 165
- Hufstedler, Shirley M., 88, 236
- impeachment, *see* federal judges, discipline and removal of
- indigent criminal defendants, counsel for, 4, 113, 115–135, 158
- Jenner, Albert E., 108
- Johnson, Frank Minis, Jr., 62
- Johnson v. Zerbst*, 116
- Judicial Conference of the United States
  - Advisory Committee on Rules of Civil Procedure, 247, 262, 275
  - and bankruptcy reform, 47–49
  - and case management and settlement, 241
  - and counsel for indigent criminal defendants, 116–117, 132
  - and court-annexed arbitration, 254, 260
  - and diversity jurisdiction, 217
  - and Fifth Circuit split, 64–65
  - and judicial discipline, 299, 321, 326
  - and sentencing reform, 196–197, 200, 202, 206–207, 209–210
  - and speedy trial, 167, 169–170
  - and U.S. magistrate judges, 11–12
- Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 301, 318, 326–328
- Judicial Improvements and Access to Justice Act, 258
- judicial independence, 8, 54–55, 300–301, 312–315, 321–323
- Judicial Panel on Multidistrict Litigation, 2, 5, 215, 287–297

- jurisdiction
  - diversity of citizenship, 2, 4, 213–214, 216–236, 250, 283–287
  - federal question, 225–228
- Kaufman, Irving R., 322–325
- Kayton, Irving, 99
- Kennedy, Edward M., 105, 196–197, 200, 211, 326
- Kirkham, Francis R., 270
- Kleindienst, Richard G., 183
- Kutak, Robert J., 90
- Lay, Donald D., 92
- Levin, Theodore, 13
- Lumbard, J. Edward, 320
- MacCarthy, Terence F., 132
- Mapp v. Ohio*, 186
- Marsh, Harold, 41
- Mathias, Charles McC., Jr., 206, 209, 211
- Meador, Daniel J., 98, 103, 273
- Meredith v. Fair*, 61
- Metzner, Charles M., 29
- Meyerson, Bruce, 276
- Mikva, Abner J., 161
- Miller, Arthur R., 280
- Miranda v. Arizona*, 135, 186
- Mitchell, John N., 151, 156, 163, 167, 171
- Mondale, Walter F., 271
- Mullinix, Edward W., 231
- Murrah, Alfred P., 287–288, 290, 292
- NAACP, 76–79, 227–228
- National Bankruptcy Review Commission, 33, 50
- National Commission on Judicial Discipline and Removal, 301, 326
- National Conference of Bankruptcy Judges, 31
- national court of appeals, 2, 4, 58–59, 79–97
- Neuborne, Burt, 26
- Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 9, 32–33, 48–49
- Nunn, Sam, 300, 316
- O'Donnell, Pierce, 202
- Orleans Parish School Board v. Bush*, 61
- patent litigation, 59, 88, 98–103, 107–112
- Peckham, Robert F., 238, 243
- Plank, Thomas E., 54
- Pomerantz, Abraham L., 264
- preventive detention, 3–4, 114, 135–137, 146–159, 172–175
- Price, Philip, 294
- public defenders, see indigent criminal defendants, counsel for
- referees in bankruptcy, 4, 8, 42, 44, 47, 49
- Rehnquist, William H., 165
- Resnik, Judith, 241, 243, 245
- Rives, Richard T., 61–62, 65
- Robson, Edwin A., 252, 292
- Rodino, Peter, 71
- Rogers, Byron G., 128
- Sandalow, Terrance, 94
- Sanders v. U.S.*, 176, 178
- Sawyer, Henry W. III, 289
- Schneckloth v. Bustamonte*, 187
- Schwarzer, William W, 238
- Scott, Hugh, 294
- sentencing, 4, 114–115, 195–212
- Sentencing Reform Act of 1984, 115, 195, 209
- Shartel, Burke, 299
- Shepherd, John C., 231
- Simmons, Althea T. L., 76
- Simon, William, 268, 296
- Sixth Amendment, 113, 115, 121, 127, 136, 163–164, 167
- Smith, Talbot, 15
- Smith, William French, 188, 190, 194
- Snyder v. Harris*, 263
- Special Committee on the Geographic Organization of the Courts (Biggs Committee), 63–66
- Speedy Trial Act of 1974, 4, 12, 114, 136, 147, 153, 160–172
- Stevens, John Paul, 100
- Stone v. Powell*, 187
- Study Group on the Caseload of the Supreme Court (Freund Group), 82–88
- Summers, Hatton, 299

- Supreme Court of the United States
  - accessibility of, 58, 60, 81–82, 185–186, 192
  - and bankruptcy, 9, 32–33, 48–49
  - and *Chandler* case, 309–313
  - and class actions, 262–264, 271
  - and diversity jurisdiction, 217
  - and habeas corpus, 176–177, 180, 185–187
  - and rights of criminal defendants, 113, 116, 135
  - and sentencing, 115
  - and speedy trial, 167
  - and U.S. magistrate judges, 11
  - caseload of, 79–80, 85, 89, 186
  - nature of cases heard, 92, 94–95
  - review of petitions for certiorari, 2, 58, 80–88, 90, 97, 185–186
  - role in harmonizing national law, 89, 96–97, 106–107
- Sweeney, Dennis, 24
- Swift v. Tyson*, 217
- Thurmond, Strom, 196, 200
- Torbert, C. C., Jr., 187
- Townsend v. Sain*, 176
- Tribe, Laurence H., 156
- Tuttle, Elbert P., 62
- Tydings, Joseph D., 10, 13, 300, 302, 304, 316
- U.S. bankruptcy judges, 2, 4, 7–9, 30–55
- U.S. commissioners, 4, 9–10, 13–17, 19
- U.S. Court of Claims, 59, 98–99, 104–105, 109–110, 112
- U.S. Court of Customs and Patent Appeals, 59, 98–99, 104–105, 109–110, 112
- U.S. courts of appeals
  - caseloads of, 57, 59–60, 68, 107–108
  - Eleventh Circuit, 58, 62
  - Federal Circuit, 4, 59, 97–112
  - Fifth Circuit, 4, 57–58, 60–79
  - judgeships, 57
  - Ninth Circuit, 57–58, 60–61, 71
- U.S. Department of Justice
  - and alternative dispute resolution, 256–258
  - and bankruptcy, 32, 48–49
  - and counsel for indigent criminal defendants, 117, 124, 126–127, 132
  - and creation of magistrate system, 12, 22, 24, 27
  - and diversity jurisdiction, 223
  - and habeas corpus, 183–188, 190, 193–195
  - and preventive detention, 146–147
  - and proposal for public action, 263, 273–282
  - and proposal for specialized appellate court, 98–99, 103–105
  - and speedy trial, 163, 165–166, 169–171
- U.S. ex rel. Jones v. Franzen*, 188
- U.S. magistrate judges, 2, 4, 7–30
- U.S. Senate Committee on the Judiciary, report on bill for Federal Circuit, 111
- U.S. Sentencing Commission, 4, 114–115, 195–196, 208–212
- U.S. Supreme Court, see Supreme Court of the United States
- U.S. v. Booker*, 115, 197
- U.S. v. Raddatz*, 12
- U.S. v. Salerno*, 147
- U.S. v. Wood*, 61
- Wade v. U.S.*, 186
- Wainwright v. Sykes*, 187
- Wald, Patricia M., 153
- Wallace, J. Clifford, 318
- Warren, Earl, 63, 82, 218, 233, 287–288
- Wechsler, Herbert, 217–218, 227, 233
- Weckstein, Donald T., 221
- Weinstein, Jack B., 247
- Will, George L., 141
- Wingo v. Wedding*, 11
- Wisdom, John Minor, 61–62, 65, 69
- Wolfman, Brian, 285
- Wright, Charles Alan, 64
- Wulf, Melvin L., 184
- Yackle, Larry W., 190
- Zahn v. International Paper Co.*, 263

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